FIGHTING CORRUPTION IN EASTERN EUROPE AND CENTRAL ASIA

ANTI-CORRUPTION REFORMS IN UKRAINE

5TH ROUND OF MONITORING OF THE ISTANBUL ANTI-CORRUPTION ACTION PLAN

PILOT

OECD

Anti-Corruption Reforms in Ukraine

Pilot 5th Round of Monitoring Under the Istanbul Anti-Corruption Action Plan

OECD

Please cite as: OECD (2022), Anti-Corruption Reforms in Ukraine: Pilot 5th Round of Monitoring Under the OECD Istanbul Anti-Corruption Action Plan

https://doi.org/10.1787/b1901b8c-en

© OECD 2022

This work is published under the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Member countries of the OECD, the Member countries of the OECD Anti-Corruption Network for Eastern Europe and Central Asia, or the Parties to the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

This document and any map included herein are without prejudice to the status or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city, or area.

This publication was produced with the financial support of the European Union. Its contents are the sole responsibility of the OECD and do not necessarily reflect the views of the European Union.

Foreword

This pilot monitoring report was prepared within the framework of the Istanbul Anti-Corruption Action Plan (IAP), a peer review programme of the OECD Anti-Corruption Network for Eastern Europe and Central Asia (OECD/ACN).

The programme covers ten countries: Armenia, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Mongolia, Tajikistan, Ukraine and Uzbekistan. Other countries in the region, OECD countries, international organisations and non-governmental partners participate in the implementation of the IAP as experts and donors.

The first four rounds of monitoring under the IAP were completed in 2019 and prepared the ground for the 5th round of monitoring using newly developed, indicator-based methodology. This pilot report, along with other pilot reports on Armenia, Azerbaijan, Georgia and Moldova tests the new monitoring tool which comprises indicators, a guide to the indicators and the results-based monitoring methodology before the launch of the 5th round of monitoring.

This report, elaborated before Russia's large scale aggression against Ukraine, is supported by the OECD component of the EU for Integrity Programme which covers Armenia, Azerbaijan, Georgia, Moldova and Ukraine.

The Pilot Performance Indicators for the 5th round of monitoring adopted by the OECD/ACN Steering Group in May 2020 and amended in November 2020. The pilot monitoring covered 13 Performance Areas comprising performance indicators and benchmarks. Indicators and pilot procedures are available at https://www.oecd.org/corruption/anti-bribery/corruption/acn/istanbul-action-plan.htm.

The pilot monitoring team included: Diāna Kazina (Latvia), Julien Betolaud (France) Silviu Popa (Romania), Inese Kušķe (Latvia), Ciril Kersmanc (Slovenia), Mary Butler (United States), Dirk Plutz (EBRD), Matthew Hudson (EBRD), from the OECD/ACN Secretariat: Rusudan Mikhelidze (team leader), Noel Merillet (drafting PA 2 and PA 4), Sofia Tirini (contributions to PAs 8-10), Arianna Ingle (communications and editorial support) and Tamara Schelkunova (administrative support).

The coordinator of the Ukraine National Agency for Corruption Prevention (NACP) was represented by Ivan Presniakov, Deputy Head of the NACP.

The pilot assessment was launched in December 2020. Ukraine provided replies to the questionnaire and supporting materials such as laws and statistics in February-April 2021. The virtual on-site visit to Ukraine took place on 1-14 June 2021 and included sessions with governmental and non-governmental representatives. Civil society organisations, business and international representatives provided replies to the monitoring questionnaire, participated in the virtual on-site visit, and commented on the draft assessment report. Following bilateral consultations, this pilot monitoring report was adopted at the OECD/ACN plenary meeting on 25-29 October 2021.

Executive summary

The Ukraine National Agency for Corruption Prevention (NACP) developed a draft **anti-corruption strategy** in 2020, some time after the expiry of the previous document in 2017. The draft is evidence-based and targets significant corruption risk areas. Its development has benefited from extensive public consultations. The adoption of the strategy is still pending and this delay is hindering the coordination and monitoring of the implementation of anti-corruption policy reforms in Ukraine. While non-governmental stakeholders are not involved in monitoring as such, civil society representatives are part of the NACP's Public Council overseeing the Agency's activities, including its anti-corruption policy-related mandate. An independent commission is expected to be set up to assess the NACP's performance regularly.

Ukraine's **conflict of interest** (COI) legal framework is comprehensive and the NACP is assigned to oversee its implementation, but the level of enforcement by courts is low. The NACP's efforts to collect and publish information on conflict of interest are encouraging but they lack a systemic approach. The absence of central registries on gifts and conflict of interest resolutions have also impeded regular collection and dissemination of information.

The **asset and interest disclosure** system is well-advanced in Ukraine. The fully electronic system includes declarations in easily searchable, open data format. Verification is also in place and enforcement of relevant rules is increasing. In the past, the NACP has been criticised for alleged bias in verification practices, leading to rebooting of the Agency and changing its governance model. Newly recruited leadership and staff enjoy a higher-level public trust. Constitutional Court of Ukraine's (CCU) several decisions paralyzed the verification of asset declarations and sanctioning process declaring the NACP's related powers unconstitutional and abolishing criminal responsibility for intentional failure to declare, as well as false declarations. The Parliament reinstated these rules but the restored provisions do not have a retroactive effect resulting in a time-gap for enforcement and a large number of terminated cases.

Ukraine recently further strengthened its already comprehensive framework for **protection of whistleblowers**. Diverse protection guarantees are in place and most of them applied in practice by the NACP. Ukraine's progressive approaches include legal aid regime to represent whistleblowers in court, the extension of protections to whistleblowers' family members, allowing whistleblower's full discretion in choosing reporting channels and financial incentives for whistleblowers in criminal corruption cases. In the future, it would be important to ensure full operation of the public sector reporting channels and increase awareness about them to enhance reporting corruption and related violations. The resources of the NACP's responsible unit should be reinforced as well. A launch of the Unified Portal of Whistleblower Reports is foreseen.

Numerous reforms have been ongoing in the past in the area of **judicial independence**, but the lack of independent formation and operation of the judicial governance bodies continued to be a key obstacles to judicial independence and integrity in Ukraine. The lack of trust in the judiciary remains a major obstacle to foreign investment. The judicial reform bills of July 2021 concerning High Council of Justice (HCJ) and High Qualification Commission of Judges (HQCJ), adopted after several versions of draft laws, Constitutional Court decisions to block the reform, and the Venice Commission Opinions, aim to address this issue by setting up judicial governance bodies anew with a decisive role played by international experts in selecting members of these bodies. Considering the similar successful model of the selection of judges

for the High Anti-Corruption Court of Ukraine (HACC), these amendments are a significant step forward supported by internal and external partners. However, the results have yet to be seen.

The vetting of all judges is suspended pending the implementation of the new reform and resulting in serious understaffing. Judicial remuneration appears sufficient but court staff receive nominal salaries and some discretionary bonuses. Overall, the funding of the judiciary does not seem to ensure its autonomy. Automatic distribution of cases is set in the law, but in practice transparent and objective case assignment excluding undue internal or external interference does not seem to have been ensured. Grounds for disciplinary liability of judges are not clearly defined and stakeholders do not see disciplinary proceedings against judges as impartial.

The **Prosecution Service** of Ukraine has undergone several rounds of reforms too. In September 2019, a new two-year comprehensive reform was launched with temporary procedures for selection, appointment and promotion of prosecutors aimed at speedy vetting of all practicing prosecutors and filling in vacancies through a merit-based process involving international experts. However, the process has been stalled. The appointment and dismissal of Prosecutor General is not based on objective and transparent grounds and prosecutorial governance bodies do not play a role in this process. There is perception among the main stakeholders that these decisions are entirely politically motivated unbounded by established criteria or even legal qualifications. The Prosecutorial Council or another similar body is not responsible for the performance evaluations of prosecutors. The assignment and re-assignment of cases among prosecutors is not based on clear and transparent rules.

Primary **public procurement** legislation covers all areas of economic activity concerning public interests including state-owned enterprises, utilities and natural monopolies, and the non-classified area of the defence sector. Exemptions from competitive procurement are limited and clearly defined. The Law of Ukraine on Public Procurement was amended recently to exclude pandemic related procurement, which is a negative development, but the results of procurement are made public in the electronic procurement system. The Ukrainian electronic public procurement system ("Prozorro") is mandatory for central authorities, monopolies and other public contracting authorities, and encompasses all procurement processes. Procurement remains open for foreign bidders. Procurement complaints are properly addressed, and the review body operates independently and impartially. There is a low track record of prosecution of corruption offences and enforcement of conflict of interest restrictions in the procurement process. A wide range of procurement related data and statistics are published online and data is available in machine-readable format.

Knowledge and experience of **business integrity** issues is increasing, as is the depth and development of the anti-bribery and corruption compliance community more generally. In key areas, for example, mechanisms to address concerns of companies related to corruption and bribe solicitation by public officials, Ukraine's efforts have been impressive and the Business Ombudsman Council (BOC) is a respected and effective institutional example for its regional peers to follow. Ukraine's online publication of beneficial ownership information, available in searchable format for free, is a welcome step towards transparency. The Corporate Governance Code provides a useful tool for listed and unlisted companies (including SOEs) seeking to manage their corruption risks. There is a lack of meaningful monitoring and sanctions for violations of requirements regarding beneficial ownership information. Furthermore, there are no credible administrative, procedural or legal incentives for businesses to improve integrity practices. Whilst there is an increasing awareness of the need for robust internal anti-corruption controls at state-owned entities, application of these controls across the ten companies reviewed remains uneven. A lack of established and independent supervisory boards and permanent, competitively appointed CEOs across many of the entities raises concerns about political commitment to reform and undermines broader efforts to have a transparent and well-governed state sector. Audit practices have clearly improved, however, and public disclosure of key information by Ukraine's largest SOEs is increasing.

As regards **enforcement**, the sanctions set in the law are proportionate and dissuasive but their application raises concerns. Courts often release convicts on probation and use low sanctions, mostly fines. Cases are terminated annually due to the expiry of the statutes of limitation, which are short. The practice is different in the newly launched High Anti-Corruption Court (HACC), which does apply dissuasive and

proportionate sanctions in high level corruption cases. Time limits for conducting investigation or prosecution of complex corruption cases are short too, especially for cases where international legal assistance is needed. The Parliament no longer has to lift the immunities of Members of Parliament (MPs) but prosecutors cannot initiate a case against an MP without a decision of the Prosecutor General, this impeded effective enforcement in practice. Similarly, immunities of judges continue to be an obstacle. Criminal statistics in Ukraine are not centralised. Relevant authorities collect, analyse and publish statistics according to their own methodologies, using different templates. There is no centralised publication of enforcement statistics of corruption offences either.

The law of Ukraine provides for **liability of legal persons** through so-called "measures of a criminal law nature" (sanctions), but corporate liability is not autonomous. Non-monetary measures are not provided in criminal law, but debarment from public procurement is foreseen under Public Procurement Law (PPL). There is no due diligence (compliance) defence to exempt legal persons from liability, but the courts have to take into account measures taken to prevent corruption when imposing sanctions. Enforcement of corporate liability is still lacking. There are promising initial steps aimed at revising relevant criminal law provisions related to due diligence defence and deferred prosecution agreements.

Specialised practitioners of Ukraine's **Asset Recovery and Management Agency** (ARMA) conduct financial investigations to find, trace and manage assets and have direct access to most relevant databases. In the management of assets, the ARMA has broad authority to sell certain types of assets using a competitive process with the sale proceeds held until the case is resolved. The ARMA competitively hires contractors to manage assets subject to regular audits by ARMA's staff. While there is a room for some improvement, there is an awareness of what needs to be done. It is important to complete the development of the registry of seized and confiscated assets, develop a unified registry of bank accounts and safes, and allow disclosure of payee account numbers by banks. Importantly, Ukraine should ensure a greater level of insulation from political interference in the management of complex assets. Enforcement of confiscation is lacking and comprehensive statistics are not published or analysed.

Ukraine has made an unprecedented leap in tackling **high-level corruption** through the work of the dedicated independent investigative, prosecutorial and judicial institutions. The number of convictions in high-level corruption cases is increasing as the HACC has started concluding cases. While, proactive detection of high-level corruption cases based on various sources is ensured, the cases detected based on FIU reports and asset declaration verifications are not particularly high. Information on investigations in high-level corruption cases and its results are routinely communicated to the public.

Nevertheless, high-level corruption remains widespread and the effectiveness of combatting it is being continually undermined in various ways. There is a strong perception among key stakeholders that investigation, prosecution and adjudication of high-level corruption cases is subject to heavy political or other undue interference. While many high-level corruption allegations have been dealt with in accordance with the applicable law, there are a number of concerning recent examples of aggressive interference and attempts to manipulate the system to accomplish the result of preventing the authorised independent anti-corruption bodies from handling certain politically sensitive matters. This poses a serious threat to the rule of law and fight against corruption in Ukraine.

In Ukraine stand-alone **specialised investigative and prosecutorial bodies**, have exclusive jurisdiction over high-level corruption cases. The heads of both institutions were appointed following a transparent and merit-based procedure carried out by selection boards composed of independent experts and international dignitaries. The tenure of both heads is protected by law. There are numerous attempts to remove the current Director of National Anti-corruption Bureau of Ukraine (NABU), including through many draft laws widely seen as attempts to deprive the NABU of its institutional independence. As the former head of Specialised Anti-corruption Prosecutor's Office (SAPO) resigned in 2020, significant powers of the SAPO are now exercised by the current Prosecutor General until the head is appointed. A competitive selection process of the new head is ongoing but delays appear motivated to ensure that the SAPO does not regain its independence under the law. There is a growing negative trend of circumventing of NABU and SAPO jurisdiction without any apparent legal justification.

Table of contents

Foreword 3

Executive Summary 4

Acronyms 10

1 Anti-Corruption Policy 11

Indicator 1.1. The anti-corruption policy is up-to-date, evidence-based and includes key corruption risk areas 11
Indicator 1.2. The anti-corruption policy development is inclusive and transparent 13
Indicator 1.3. The anti-corruption policy is effectively implemented 15
Indicator 1.4. Coordination and support to implementation is ensured 17
Indicator 1.5. Regular monitoring and evaluation is ensured 19

2 Conflict of Interest 23

Indicator 2.1. Legal and institutional framework on conflict of interest is in place 23
Indicator 2.2. Unbiased and vigorous enforcement of regulations is ensured 28
Indicator 2.3. Information on COI is published 32

3 Asset and Interest Disclosure 35

Indicator 3.1. Asset and interest disclosure applies to high corruption risk positions 36
Indicator 3.2. Asset and interest disclosure is comprehensive and regular 37
Indicator 3.3. An electronic system is in place and publication of information from declarations is ensured 40
Indicator 3.4. Unbiased and effective risk-based verification of asset and interest declarations is ensured with a follow-up 42
Indicator 3.5. Dissuasive and proportionate sanctions are enforced 47

4 Protection of Whistleblowers 51

Indicator 4.1. The whistleblower protection is guaranteed in law 51
Indicator 4.2. Effective mechanisms are in place to ensure that whistleblower protection is applied in practice 57
Indicator 4.3. The public is aware of and has trust in existing protection mechanisms 59
Indicator 4.4. The whistleblower protection system is operational and protection is ensured in practice 62

5 Independence of Judiciary 65

Indicator 5.1. Judicial tenure is guaranteed in law and practice 66

Indicator 5.2. Judicial appointment and promotion are based on merit, the involvement of political bodies is limited 68
Indicator 5.3. Court presidents do not interfere with judicial independence 71
Indicator 5.4. Judicial budget and remuneration guarantee financial autonomy of the judiciary and judges 72
Indicator 5.5. Status, composition, mandate and operation of the Judicial Council guarantee judicial independence and integrity 74
Indicator 5.6. Distribution of cases among judges is transparent and objective; judicial decisions are open to the public 79
Indicator 5.7. Judges are held accountable through impartial decision-making procedures that protect against arbitrariness 81

6 Independence of the Prosecution Service 87
Indicator 6.1. Prosecutor General is appointed and dismissed transparently and on the objective grounds 87
Indicator 6.2. Appointment and promotion of prosecutors are based on merit and clear procedures 90
Indicator 6.3. The budget of the public prosecution service and remuneration of prosecutors guarantee their financial autonomy and independence 93
Indicator 6.4. Status, composition and operation of the Prosecutorial Council guarantee the independence of the public prosecution service 94
Indicator 6.5. The Prosecutorial Council has broad responsibility for the functioning of the public prosecution service, is transparent and impartial 97
Indicator 6.6. Assignment of cases among prosecutors is transparent and objective; prosecutors can challenge orders they receive 98
Indicator 6.7. Prosecutors are held accountable through impartial decision-making procedures that protect against arbitrariness 100

7 Integrity in Public Procurement 104
Indicator 7.1. Public procurement system is comprehensive and well-functioning 104
Indicator 7.2. Procurement complaints are addressed 107
Indicator 7.3. Dissuasive and proportionate sanctions are enforced for procurement related violations 109
Indicator 7.4. Public procurement is transparent with independent oversight 110

8 Business Integrity 112
Indicator 8.1. Boards of directors of listed companies/publicly traded companies are responsible for oversight of the management of corruption risks 113
Indicator 8.2. Public disclosure of beneficial ownership of all companies registered in the country is ensured 114
Indicator 8.3. There are incentives for all types of companies to improve integrity of their operations 118
Indicator 8.4. There are mechanisms to address concerns of all companies related to corruption and bribe solicitation by public officials 119
Indicator 8.5. State fulfils its role of an active and informed owner of SOEs and ensures the integrity of their governance structure and operations 123

9 Enforcement of Corruption Offences 129
Indicator 9.1. Liability for corruption offences is effectively enforced 129
Indicator 9.2. Proportionate and dissuasive sanctions for corruption are applied in practice 130

Indicator 9.3. The statute of limitations period and immunities do not impede effective investigation and prosecution of corruption 133
Indicator 9.4. Enforcement statistics on corruption offences is used for analysis and available for the public 135

10 Enforcement of Liability of Legal Persons 137
Indicator 10.1. The law provides for an effective standard of liability of legal persons 137
Indicator 10.2. Sanctions for legal persons are proportionate and dissuasive 139
Indicator 10.3. Due diligence (compliance) defence is in place 141
Indicator 10.4. Statute of limitations period and investigation time limits do not impede effective corporate liability 142
Indicator 10.5. Liability of legal persons is enforced in practice 142
Indicator 10.6. Enforcement statistics on corporate liability is used for analysis and available for the public 144

11 Recovery and Management of Corruption Proceeds 146
Indicator 11.1. The functions of identification, tracing, management and return of illicit assets are performed by specialised officials 147
Indicator 11.2. Identification and tracing of corruption proceeds are effective 148
Indicator 11.3. Confiscation measures are enforced in corruption cases 152
Indicator 11.4. The return and further effective and transparent disposition of the corruption proceeds is ensured. 153
Indicator 11.5. Management of seized or frozen assets is cost-efficient and transparent 155
Indicator 11.6. Data on asset recovery and asset management in corruption cases is collected, analysed and published 158

12 Investigation and Prosecution of High-Level Corruption 160
Indicator 12.1. Fight against high-level corruption is given a high priority 161
Indicator 12.2. Criminal statistics on high-level corruption is published analysed and used in updating policy 162
Indicator 12.3. High-level corruption is actively detected and investigated 163
Indicator 12.4. Liability for high-level corruption offences is effectively, independently and impartially enforced 167

13 Specialised Anti-Corruption Investigation and Prosecution Bodies 171
Indicator 13.1. The anti-corruption specialisation of investigators is ensured 171
Indicator 13.2. The anti-corruption specialisation of prosecutors is ensured 174
Indicator 13.3. Appointment of heads of the specialised anti-corruption investigative and prosecutorial bodies is transparent and merit-based with their tenure in office protected by law 176
Indicator 13.4. The staff of the specialised anti-corruption investigative body is impartial and autonomous from external and internal pressure 180
Indicator 13.5. The specialised anti-corruption investigative and prosecutorial bodies have adequate human and financial resources 183
Indicator 13.6. The specialised anti-corruption investigative body has necessary powers, investigative tools and expertise 185
Indicator 13.7. Work of the specialised anti-corruption prosecutors and anti-corruption investigative body or unit is transparent and audited 186
Indicator 13.8. Specialised anti-corruption investigators and prosecutors are held accountable 188

Acronyms

ACC	Anti-corruption council
ACN	Anti-corruption network for Eastern Europe and Central Asia
AI	Artificial Intelligence
ARMA	Asset Recovery and Management Agency of Ukraine
AMCU	Antimonopoly Committee of Ukraine
CC	Criminal Code of Ukraine
CCU	Constitutional Court of Ukraine
CEO	Chief executive officer
CEPEJ	Council of Europe European Commission for the efficiency of justice
COI	Conflict of interest
CPC	Criminal Procedure Code
CSO	Civil society organisation
CPL	Corruption Prevention Law of Ukraine
EBRD	European Bank for Reconstruction and Development
FATF	Financial Action Task Force
FIU	Financial Intelligence Unit
GRECO	Council of Europe Group of States against Corruption
HACC	High Anti-Corruption Court of Ukraine
HCJ	High Council of Justice of Ukraine
IT	Information technologies
JSC	Joint-stock company
LAC	Logical and Arithmetical Control (of asset declarations)
MOJ	Ministry of Justice of Ukraine
NABU	National Anti-Corruption Bureau of Ukraine
NACP	National Agency for Corruption Prevention of Ukraine
NATO	North Atlantic Treaty Organisation
OECD	Organisation for Economic Co-operation and Development
OSCE/ODIHR	Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe
PA	Performance Area
PEPs	Politically Exposed Persons
PGO	Prosecutor's General Office of Ukraine
PPL	Public Procurement Law of Ukraine
PSL	Prosecution Service Law of Ukraine
SAPO	Specialised Anti-Corruption Prosecutor's Office of Ukraine
SOE	State-owned enterprise
SSU	State Security Service of Ukraine
TI	Transparency International
UNCAC	United Nations Convention Against Corruption
UNDP	United Nations Development Programme

1 Anti-Corruption Policy

Ukraine's most recent anti-corruption policy documents (Strategy and Action Plan) expired in 2017. In 2020, the National Agency for Corruption Prevention (NACP), the body responsible for anti-corruption policy development, coordination and monitoring, developed a new draft Strategy through commendable, inclusive and transparent public consultations. The draft Strategy is evidence-based and targets important corruption risk areas. The adoption of the Strategy has been pending following its first reading in the Parliament in November 2020. This delay has hampered the coordination and monitoring of the implementation of new anti-corruption policies in Ukraine.

Indicator 1.1. The anti-corruption policy is up-to-date, evidence-based and includes key corruption risk areas

Background

Ukraine's anti-corruption policy documents (Strategy and Action Plan) expired in 2017. The state body in charge of anti-corruption policy development, coordination and monitoring, the National Agency for Corruption Prevention (NACP) began the work on a new anti-corruption strategy in early 2020 when its leadership and management structure changed (see indicator 4). After extensive preparations and public consultations, the document was submitted to the Verkhovna Rada and adopted with the first reading in November 2020[1] but the adoption with the second reading planned in summer 2021 has been postponed. The Committee on Anti-Corruption Policy of Verkhovna Rada considered more than 500 amendments to the draft by MPs in preparation for the second reading, and some measures have been excluded, but the initial draft has not been changed substantially.

According to the Government, in the absence of anti-corruption policy documents, in the reporting period the sources of anti-corruption policy have been various national and agency level programme documents, such as the plan of work of the Government and the Parliament, the NATO-Ukraine action plan and others. However, these cannot be regarded as anti-corruption policy documents for the purposes of the pilot monitoring of this performance area, which focuses specifically on Ukraine's Strategy and Action Plan.

1 Draft Law of Ukraine "On the Principles of State Anti-Corruption Policy for 2020–2024" – draft Anti-Corruption Strategy 2020-2024 – is referred to as the "draft Strategy". The "State Programme" is also referred to as the "Action Plan".

Assessment of compliance

Benchmark 1.1.1.

The policy is based on evidence, it is regularly reviewed and updated as necessary, and policy documents are published online

Outstanding in Ukraine: Anti-corruption policy documents are not in place. The preceding policy documents have not been reviewed regularly.

The previous strategy for 2014-2017[2] and action plan for 2015-2017[3] were evidence-based and were published, but have not been reviewed regularly. During the visit, Government representatives stated that the documents remained up-to-date nevertheless, although only one technical change was introduced.

The draft Strategy is evidence-based, numerous sources were used to prepare the draft,[4] including the analysis of corruption situations, national and targeted surveys, statistics, risk analysis, research carried out by non-governmental organisations, and international assessments. These sources of evidence are reflected in the explanatory note of the draft. The draft Strategy provides a clear explanation of priorities and measures, as well as the impact they aim to achieve. To develop the document, the NACP created expert groups for each theme that included civil society representatives who consider the draft in good quality and an evidence-based document.[5] The stakeholders interviewed during the visit were unanimous in their positive regard of the draft.

The NACP reported that the draft Action Plan is also being developed and will be finalised after the adoption of the Strategy. The monitoring team encourages Ukraine to swiftly adopt the Strategy followed by the adoption of the Action Plan.

Benchmark 1.1.2.

The policy addresses high corruption risk areas and sectors

The draft Strategy targets high corruption risk areas as revealed by evidence-based analysis. Various surveys showed that in Ukraine, areas most vulnerable to corruption are the judiciary, healthcare, the police and prosecution service, public procurement at local and regional level, privatisation and rent of state and municipal property, SOEs, criminal justice bodies and political party financing. The draft Strategy includes specific measures targeting these areas and sectors. In addition, there is a separate Government

2 Law of Ukraine "On the principles of state anti-corruption policy in Ukraine (Anti-corruption strategy) for 2014-2017"
3 Law of Ukraine "On approval of the State Programme for the implementation of the principles of state anti-corruption policy in Ukraine (Anti-Corruption Strategy) for 2015-2017"
4 Explanatory note of the Anti-Corruption Strategy
5 TI Ukraine, "Why Should MPs Vote For The Anti-Corruption Strategy?"

action plan that addresses corruption in the health sector based on a separate risk assessment conducted by the NACP. NGOs responding to the monitoring questionnaire, confirmed that the draft Strategy covers high-risk areas and sectors perceived as the most corrupt by the general public, including the business community. Transparency International (TI) Ukraine pointed out that in the initial draft, the police and prosecution service were not addressed, but the NACP later updated the draft.[6]

Benchmark 1.1.3.

The policy addresses high-level corruption

Ukraine highlighted various policy objectives of previous policy documents (2014-2020), focusing on both law enforcement and preventive anti-corruption institutions to demonstrate that the fight against high-level corruption is prioritised. Additional information underlined that each of these measures had corresponding performance indicators, responsible agencies, timelines for implementation, and sources of funding.

The new draft Strategy does not target high-level corruption as a separate policy objective but, according to the Government, it is addressed indirectly by measures focused on the oil and gas industry, defence procurement, pre-trial investigations, integrity of political parties and election campaigns, anti-corruption reform of judiciary and prosecution service, as well as law enforcement bodies, defence sector, economic regulations, high-level corruption in customs and tax authorities, construction, land and infrastructure, and measures aimed at strengthening the efficiency and independence of NABU, SAPO, HACC, ARMA. Whereas Ukraine's efforts to address high-level corruption are not questionable, this benchmark is narrowly formulated and requires the country to show that the policy document is in force and it includes specific measures with budget and performance indicators addressing high-level corruption. Mere declaratory or general provisions about priorities are not sufficient.

Indicator 1.2. The anti-corruption policy development is inclusive and transparent

Background

The development of new anti-corruption policy documents started in January 2020. The process has been widely inclusive and transparent. The Government collected inputs from experts and anti-corruption CSOs and conducted extensive public consultations. The process involved civil society, academia, researchers, independent experts, representatives of general public and international organisations.

6 TI Ukraine, "What's Right And What's Wrong With NACP's Anti-Corruption Strategy"

Assessment of compliance

Benchmark 1.2.1.

Draft policy documents are published online

The draft Strategy was published on the NACP website in June 2020. These documents were also published on the websites of the Cabinet of Ministers and of the Verkhovna Rada. It would be important to publish the draft action plan too.

Benchmark 1.2.2.

Public consultations are held with adequate time for feedback

A series of thematic public consultations were held on the draft Strategy in the summer of 2020, attracting a large number of participants who had the opportunity to submit their suggestions and comments.[7] Stakeholders had more than three weeks for inputs on the draft Strategy and considered this time sufficient. The NACP co-organised with TI Ukraine two of the eight public discussions. The consultations included 270 participants, 26 invited experts, and over 30,000 viewers on social media. According to TI Ukraine, the Agency actively engaged with the public, and the public enthusiastically commented on the draft Strategy.

During the visit, the stakeholders commended the consultations organised by the NACP for the development of the draft Strategy in cooperation with civil society and referred to this process as a good practice in preparing policy documents in general.

Benchmark 1.2.3.

Before the adoption of policy documents, government provides a public explanation on the comments that have not been included

The NACP prepared a report based on the results of the public consultation on the draft Strategy and posted it on its official website.[8] This extensive report provides detailed feedback on the comments received, taken on board, what was not, and why. CSOs underlined that this is the first time they had received such detailed feedback on their input, which is commendable.

7 NACP, Report on the results of the public consultation
8 Ibid

Indicator 1.3. The anti-corruption policy is effectively implemented

Background

The anti-corruption policy documents expired in 2017 and new documents have not been adopted. Ukraine refers to various strategic documents that contain anti-corruption measures. However, the focus of the indicator is the implementation of the anti-corruption policy documents in 2020 and not of isolated measures dispersed in multiple government policy documents.

Assessment of compliance

Benchmark 1.3.1.

At least 90% of measures planned for the reporting period were fully implemented according to the government reports

At least 80% = 6 points

At least 60% = 3 points

Outstanding in Ukraine: Anti-corruption policy documents are not in place since 2017 and thus implementation cannot be assessed.

The NACP provided the monitoring team an assessment of compliance of anti-corruption measures that were dispersed in several strategic documents, by identifying measures with an anti-corruption focus and reporting on their implementation. However, the benchmark assesses the implementation of anti-corruption policy measures planned for the reporting period. In the absence of policy documents, it is impossible to assess what has been planned and what percentage has been implemented, which has not been provided by the Government.

The aim of this benchmark is to promote realistic planning and effective implementation of the commitments made by state bodies reflected in the anti-corruption policy documents (strategies and action plans). The benchmark encourages state bodies to commit to measures that are enforceable in a given period of time with resources at hand. By requiring reporting on this issue, the benchmark also promotes regular monitoring of implementation.

According to the Government, the Anti-Corruption Strategy for 2014-2017 had an implementation rate of 80%.

Benchmark 1.3.2.

There is a wide perception among the main stakeholders that policy documents are properly implemented

However, main stakeholders perceived that previous policy documents were not properly implemented. According to CSO responses to the questionnaire, as of the beginning of 2019, the level of implementation of 44 measures stipulated by the Anti-corruption Strategy for 2014-2017 was the following: 11 – fully implemented; 23 – partially implemented; 10 – not implemented. According to CSO responses to the

monitoring questionnaire, policy measures are usually implemented properly if (1) they are not politically sensitive or (2) they are a part of a conditionality agreed with international partners and/or (3) they are subject to strong pressure from stakeholders.

During the on-site visit, the main stakeholders also pointed to a wide gap between the assessment of implementation by the Government and CSOs. Whereas the Government considered 80% of measures implemented, a draft alternative report shows that level of implementation of the Anti-Corruption Strategy for 2014-2017 did not even reach 65% and the implementation of many measures were delayed.[9]

Nevertheless, according to the Government, Ukraine has made good use of the anti-corruption policy documents in the past and their impact has been substantial. Adopted as a law, the Anti-Corurption Strategy for 2014-2017 facilitated setting up of the anti-corruption infrastructure and paved the way for comprehensive reforms. The stakeholders interviewed during the on-site visit shared this view. Underscoring the importance of the policy documents as tools in the hands of the "agents of change", the stakeholders interviewed during the on-site visit expressed their concerns about the lack of political will to implement the commitments of the Strategy in Ukraine, pointing to the example of the recent changes in the leadership of Naftogaz – a state-owned company, while the declared goal has been to adhere to the corporate governance standards of the OECD. Another cited example was the independence of NABU being one of the main objectives of the policy but being undermined with recent draft laws. At the same time, the civil society representatives stated that in general, specialised anti-corruption institutions are using these tools to push for substantial reforms, and advocate for positive change, and it is the political authorities who create obstacles for reforms.

Benchmark 1.3.3.

The policy has its estimated budget

In connection with the estimated budget for the Strategy, the authorities informed during the visit that, after the adoption of the Strategy, the State Programme would be adopted and it will include information on funding. Most of the budget will be composed on the existing budget of the institutions and only a few measures will need additional funding, for example the development of various IT solutions.

The NACP reported that the budget for anti-corruption measures in Ukraine is usually provided through budgets of anti-corruption institutions and other state bodies. In addition, all programme documents clearly define the sources of funding for relevant activities. At the same time, the draft state budget for 2022 as submitted to the Parliament did not foresee funds for the implementation of the Strategy.

To be compliant with this benchmark, the Government should demonstrate that anti-corruption policy has its own estimated budget. In particular, financial costs of the measures of the action plan should be estimated and included in the state budget. Donor assistance programmes can also serve as source of funding, as long as funds are already secured. Such an estimate can be part of the action plan itself or any other supporting document related to budget planning. It is important that the Government commit to do what they can afford and are realistic in terms of available resources, including donor funding.

9 Centre for Political and Legal Reforms (2021), Alternative Report (project) on assessing the effectiveness of the implementation of state anti-corruption policy

Benchmark 1.3.4.

No anti-corruption measure has been left unimplemented due to the lack of funds

According to the Government, no anti-corruption measure has been left unimplemented due to the lack of funds and the monitoring team is also unaware of any. CSOs underlined that for some measures donor assistance has been sought and provided last minute, as there were no funds foreseen in the State Programme. The monitoring team would like to stress the importance of planning and securing the necessary funding for the planned anti-corruption measures ahead of their implementation, to avoid situations where a measure could not be implemented due to unplanned donor assistance.

Indicator 1.4. Coordination and support to implementation is ensured

Background

The National Agency for Corruption Prevention is a central executive authority in charge of anti-corruption policy development, coordination and monitoring, together with preventive functions (NACP functions related to conflict of interest and asset declarations are discussed in the following sections of the report). Its Anti-Corruption Policy Department is responsible for this function.

The NACP was established in 2016 as a collegial body but it was not regarded as politically neutral, independent or efficient. The amendments to the CPL introduced in October 2019 changed the organisation of the NACP and the "management model" (from collegial to individual). The Head of the NACP was appointed as a result of a transparent and open competition with the participation of international experts in 2020. The new set up appears more efficient and the leadership gained higher public trust. The stakeholders interviewed during the visit regarded the Agency as impartial and trusted, which was not the case during the previous round of monitoring in 2017.

A high-level advisory body to the President, the Anti-Corruption Council is in place but it does not seem to be particularly active, regular and effective in its operations.

Assessment of compliance

Benchmark 1.4.1.

Coordination and monitoring functions are assigned to dedicated staff (secretariat) with necessary powers and resources at the central level and carried out in practice

Outstanding in Ukraine: Coordination and monitoring functions have not been carried out in practice

The anti-corruption policy coordination and monitoring functions are assigned to a dedicated secretariat – the NACP's Department on Anti-Corruption Policy, but they have not been carried out in practice in the absence of policy documents.

In regard to resources, the NACP's Anti-Corruption Policy Department has 4 units: Analysis of Common Indicators and Causes of Corruption Unit, Formation, Coordination and Monitoring of Anti-Corruption Policy Unit, Monitoring and Evaluation of the National Agency Unit and International Cooperation Unit

In 2020, the Department's primary focus was the development of a new policy document - the draft Strategy. The evidence provided to the monitoring team shows impressive coordination efforts involving 37 public institutions. In addition, the Department was involved in reviewing the anti-corruption impact of the proposed draft laws. Despite 9 vacancies, the staff of the human resources of the Department, that includes overall 21 positions, appeared to be sufficient in 2020. Civil society considers that in view of the wide scope of the draft Strategy, resources will not be sufficient once the policy documents are adopted and coordination and monitoring functions begin in practice, but this will be assessed next year.[10]

Regarding powers, according to the NACP it would be desirable for the NACP to have the power to issue binding instructions to the implementing agencies in case of the lack of implementation of anti-corruption measures making the head of agencies accountable for the implementation. TI Ukraine also reported on the lack of a remedy for the NACP to hold the implementing agencies accountable for the lack of implementation. The Parliament has removed the related draft provision from the draft Strategy, whereby the implementation of the measures would be the responsibility of the head of the institution in question.

In addition to the NACP, a higher-level advisory body to the President, the Anti-Corruption Council (ACC) is in place but it is not particularly active and its operations are not regular. According to the Government, the ACC has made a positive contribution to anti-corruption reforms in 2020, on at least two occasions. Firstly, it recommended to the President to propose the draft Strategy to the Cabinet of Ministers and secondly, it met after the CCU Decision to discuss the existing constitutional crises and propose a way forward. The composition of the ACC is not stable and no longer includes some prominent anti-corruption experts that were previously part of the ACC. In 2020, the ACC met twice, in September and November. According to the CSOs interviewed during the on-site, this body is currently not composed of technical experts and is not efficient in its operations.

Benchmark 1.4.2.

Focal points in implementing agencies ensure coordination and reporting to the central coordination body/unit

There are no focal points for the coordination of implementation of anti-corruption policy. So-called "authorized persons" that should be designated in each implementing agency in line with the Corruption Prevention Law (CPL) are focal points for the NACP but not for policy related matters. The monitoring team takes note of the NACP's initiative to create a permanent coordination working group involving implementing agencies and to introduce biannual reporting to the NACP, which would be a step forward to ensure coordination and reporting.

10 Centre for Political and Legal Reforms (2021), Alternative Report (project) on assessing the effectiveness of the implementation of state anti-corruption policy, p.55.

Benchmark 1.4.3.

Implementing agencies receive methodological guidance and practical advice to support policy implementation

In 2020, the NACP's relevant departments were primarily occupied with the development of the new anti-corruption policy documents, as described above. The anti-corruption strategy and action plan are not in place and subsequently, the NACP did not provide methodological guidance and practical advice for policy implementation.

Indicator 1.5. Regular monitoring and evaluation is ensured

Background

The monitoring of implementation of anti-corruption policy is the function of the NACP, which according to the regulations, reports to the Cabinet of Ministers on quarterly progress based on information received from implementing agencies and then submits a comprehensive national report on implementation of the anti-corruption strategy – the Annual National Anti-Corruption Report, along with proposals and recommendations for updating the policy. The Report is presented to the Parliament for discussion and adoption. All reports are published.

Assessment of compliance

Benchmark 1.5.1.

Regular monitoring reports based on outcome indicators are published online

The CPL adds that annual reports should include outcome indicators. The CPL also suggests that the assessment should be based on surveys and include information on the implementation of Ukraine's international anti-corruption obligations.

In the absence of the Strategy and Action Plan, the NACP did not produce quarterly progress reports but continued regular publication of annual anti-corruption reports in line with the CPL (Art. 20). The latest report for 2020 was presented to the Committee of the Verkhovna Rada of Ukraine on Anti-Corruption Policy in June 2021[11] and is available online.[12] The report analyses key anti-corruption developments in 2020 and their impact on the anti-corruption outlook of Ukraine. The monitoring team reviewed the excerpts of the report that include outcome indicators, such as statistics on the detection of criminal corruption and corruption-related offenses, the results of their investigation and judicial consideration (subsection 7.1) and section VIII which is devoted to a comparative analysis of the main statistical indicators for 2018–2020.

11 Verkhovna Rada of Ukraine (2021), The Committee on Anti-Corruption Policy heard the Chairman of the National Agency for Prevention of Corruption on the implementation of the principles of anti-corruption policy in 2020.
12 NACP (2021), National Report on the implementation of anti-corruption policy in 2020.

The quality of this analysis is however undermined by the shortcomings in relevant data calling for the reform of the existing methodology and system of statistics.

Benchmark 1.5.2.

Evaluation reports based on impact indicators are published online

The benchmark promotes regular evaluation of effectiveness and impact of anti-corruption polices and the use of impact indicators to set targets and measure results of implementation. The CPL requires that annual reports include survey data and recommendations for policy change.

According to the answers to the questionnaire, the examples of impact indicators included in these reports are:

- share of population that has a negative attitude to corruption;
- share of population with experience of corruption;
- number of citizens willing to report corruption, as well as citizens who reported corruption to the competent authorities.

The section IX of the National Report 2020 includes impact indicators and assessment of corruption, based on the results of a regular sociological survey conducted in Ukraine annually and in line with the approved methodology.

Benchmark 1.5.3.

Reports include information about budget spent

Annual reports do not seem to include information on expenditures used for the implementation of national anti-corruption programmes.

Benchmark 1.5.4.

CSOs and other stakeholders are routinely included in the monitoring of the implementation of anti-corruption policy

In the absence of anti-corruption policy documents for the reporting period, the monitoring of implementation of the anti-corruption policy did not take place. At the same time, the NACP should be commended for its active cooperation with civil society and other stakeholders in the development of the Strategy described above. In addition, the NACP stated that the latest annual report benefited from the inputs of a few NGOs and international experts. This however does not show the routine involvement of CSOs and stakeholders in the monitoring of anti-corruption policy implementation. Stakeholders also expressed concerns regarding opportunities to engage in implementation of the NACP mandate on conflict of interest and asset declarations.

In addition, the NACP has a Public Council, a collegial body tasked with the oversight of the activities of the agency to ensure its transparency and accountability.[13] The Council takes part in the competitive selection and disciplinary commissions of the NACP staff; monitors effectiveness and independent exercise of the NACP functions; considers annual reports of the NACP and the National Anti-Corruption Report and provides its assessments. The Council also participates in the development of anti-corruption policy.

The Public Council was recently renewed with its members selected through an open and transparent competition. Online open voting by citizens was organised which, according to the NACP, resulted in a highly professional composition. Stakeholders during the on-site visit agreed with the NACP's assessment, adding that the members of the Council are well known anti-corruption activists.

In 2021, the newly formed Public Council of the NACP issued an opinion on the NACP report for 2020, and assessed the work of the NACP in 2020 as "good". In areas, such as anti-corruption policy, corruption risk analysis, anti-corruption expertise, protection of whistleblowers and education, the work of the NACP was assessed as "excellent". Representatives of CSOs that provided feedback to the monitoring team consider the issued document, titled opinion on the report, incomplete, as it does not include an assessment of the NACP's performance in areas such as conflict of interest.

According to the NACP, the Information System for Monitoring the Implementation of Anti-Corruption Policy will be launched and allow systematic engagement with stakeholders in monitoring.

Benchmark 1.5.5.

Independent evaluations of policy implementation are used by the government in its assessments

The benchmark requires that the latest government assessment of the anti-corruption policy implementation should consider and reflect an independent evaluation of implementation. The NACP reported on using so-called "alternative" and other analytical reports on the analysis of the effectiveness of the anti-corruption policy implementation during the preparation of draft national reports on the implementation of the principles of the anti-corruption policy, as well as during the preparation of the draft Strategy. The stakeholders also referred to alternative reports on implementation.[14]

In addition, even though it is outside the scope of this benchmark, a good practice to be highlighted is the independent external assessment of the NACP's effectiveness envisaged by the CPL. An independent commission including international experts will conduct the assessment every two years. The preparations for the selection of the members of the commission have started and the evaluation is foreseen for 2022.

Benchmark 1.5.6.

IT tools are used to gather and analyse data for monitoring and evaluation

Currently, there are no Information Technology (IT) tools that would be used to collect and analyse data to monitor and evaluate the implementation of anti-corruption policy. The NACP is planning to work on an

[13]NACP (2021), Public Council, About the Public Council at the NACP.
[14]14Alternative reports are available here.

information system for monitoring the implementation of anti-corruption policy to increase efficiency of processes of collecting and analysing the relevant data.

2 Conflict of Interest

Ukraine has a comprehensive legislative framework governing conflict of interest (COI) and other anti-corruption restrictions provided in the law on Prevention of Corruption (CPL). A legislative gap is the lack of regulations on apparent conflicts of interest. The NACP oversees the implementation of the conflict of interest rules.

Although the sanctions provided by law for violations of conflict of interest rules appear to be proportionate and dissuasive, the key issue is the low level of enforcement of the CPL's provisions by courts. Although the NACP and the National Police are active in bringing violations to court, the number of decisions resulting in final sanctions is extremely low. The main reasons behind this are the short statute of limitation for administrative offenses, the courts closing cases due to the "insignificant nature" of the offense and the NACP's and the National Police's inability to present their case in the courts or appeal court decisions.

The NACP's efforts to collect and publish information on the implementation of conflict of interest provisions are encouraging but they lack a cohesive and systemic approach. The absence of central registries on gifts and conflict of interest resolutions have impeded regular collection and dissemination of information on enforcement of the CPL's conflict of interest provisions. A systemic approach to data collection and publication will further enhance transparency and accountability, contributing to high level of public trust to the NACP, which is a cornerstone for ensuring the NACP's resilience in the face of undue pressure, as, was recently the case.

Indicator 2.1. Legal and institutional framework on conflict of interest is in place

Background

The CPL enacted in April 2015, introduced regulations on preventing, managing and resolving conflict of interest. It applies to all professional and political public officials. Types of resolutions of *ad hoc* COI include abstention from decision-making, suspension from performing duties, restricting access to certain information, decision-making under external oversight, reassignment to another position or dismissal. Administrative sanctions are foreseen for certain violations (see benchmark 2.2.2).[15] The NACP, among other functions, is responsible for monitoring and enforcement of COI, as well as guidance, consultation, training and awareness raising. The NACP can issue legally binding notices to heads of agencies requiring them to: eliminate the violations; conduct an internal investigation; or take disciplinary action. It can also initiate administrative liability for violations but cannot present these cases in court or appeal decisions of the court.

[15] Administrative liability is provided for taking decsions in the prescence of an actual conflict of interest, absence of reporting an actual conflict of interest and for violations of restrictions on receipt of gifts and on participation in certain activities.

In 2019, the scope of application of the CPL's provisions on restrictions to certain part-time activities (article 25(2) CPL) and the obligation to transfer corporate rights (article 36(6) CPL) was reduced and it no longer covers assistants or consultants of people's deputies of Ukraine, employees of secretariats of the Chairman of the Verkhovna Rada of Ukraine, the First Deputy Chairman of the Verkhovna Rada of Ukraine and the Deputy Chairman of the Verkhovna Rada of Ukraine, or employees of secretariats of deputy factions (deputy groups) in the Verkhovna Rada of Ukraine.

Assessment of compliance

Benchmark 2.1.1.

The law assigns roles and responsibilities for preventing and managing conflicts of interest (COI) including the duty to report, duty to abstain from decision-making and duty to resolve COI

The CPL assigns the roles and responsibilities for preventing and managing conflicts of interest.

In particular, public and political officials are obliged to:

- report to their immediate supervisor an actual or potential conflict of interest, and if the person holds the position that does not have an immediate supervisor or the position in a collective body, to report to the NACP or to the responsible body under special legislation, such as the Cabinet of Ministers or Council of Judges;
- not to take any actions and not to make decisions under the conditions of an actual conflict of interest;
- and to take measures to resolve an actual or potential conflict of interest (article 28 CPL).

Authorised anti-corruption units in public authorities take measures to prevent the occurrence of actual or potential conflicts of interest by assessing corruption risks and including them in the institution's anti-corruption programme and by raising awareness on conflict of interest regulations. The immediate supervisor or the head of an authority, within two business days after receiving a notice of an actual or potential conflict of interest of one of their subordinates, makes a decision to resolve the conflict of interest, and reports to the authorised person/unit for corruption prevention. During the visit, representatives of the NACP noted that in practice the authorised person/unit also informs the NACP. Similar action has to be taken if the supervisor discovered the conflict of interest on her/his own. In addition, guidance on the existence or resolution of a conflict of interest can be requested from the NACP (article 28 CPL).

All public and political officials of Ukraine are obliged to follow the general conflict of interest regulation (article 3 paras. 1-2 of part 1 CPL), and special laws may establish certain special procedures for resolving conflicts of interest.

Benchmark 2.1.2.

The law provides for procedures for COI management, including a range of methods for COI resolution

The CPL provides for both external and self-resolving methods for resolving conflicts of interest (article 29 CPL). The elimination of a private interest excludes any possibility of its concealment. Political and public

officials with no immediate superior are to report actual or potential conflicts of interest to the NACP, which provides guidance on resolution of the conflicts of interest (article 28 CPL).

A wide range of methods for resolving conflicts of interest include; recusal of a political or public official from fulfilling a task, performing actions, or participating in decision making in situations of a real or potential conflict of interest (article 30 CPL); restricting access to information of a person where the conflict of interest is associated with such access and is of a constant nature (article 31 CPL); re-arrangement of official powers of a person if a conflict of interest in its activities is of a permanent nature (article 32 CPL); exercising official powers under external supervision if it is impossible to apply other relevant resolution methods provided by the CPL (article 33 CPL); transfer and discharge of a person due to the conflict of interest (article 34 CPL). Decisions in all of these listed cases are taken by the head of the body to which the political or public official belongs (article 28 CPL). The CPL also regulates conflicts of interest when a person owns enterprises or equity rights by requiring the transfer of the private interests to another independent natural or legal person (article 36 CPL). In such cases, public and political officials must inform the NACP of such transfers (article 36(5) CPL).

One resolution method not expressly provided by the CPL is resignation of the public official from the conflicting private-capacity position or function as a method for resolving a conflict of interest. However, legal requirements to resolve conflicts of interest (article 29(2) CPL) and the restrictions on holding a private capacity position or function (article 25 CPL, article 172-4 CAO) effectively imply this resolution method.

Benchmark 2.1.3.

The definition of COI covers actual, apparent and potential COI and includes a broad definition of private interests

Outstanding in Ukraine: The COI Law does not cover apparent conflicts of interest

In Ukraine, the CPL covers actual and potential conflicts of interest (article 1 CPL; article 28 CPL) but does not include apparent conflicts of interest.

During the visit, the NACP explained that it does not consider the inclusion apparent conflicts of interest in the CPL timely, given the lack of awareness of the existing provision. In the authorities' view, adding an extra layer to conflict of interest rules would only lead to an even greater misunderstanding of current legislation and negatively affect the NACP's efforts to prevent, manage and resolve conflicts of interest.

Private interests are defined broadly under the CPL. The definition includes any pecuniary or non-pecuniary interest of a person including those based on personal, familial, friendly, or other non-official affiliations with natural individuals or legal entities, or from membership or other relations with civil, political, religious or other organizations (article 1 CPL).

Benchmark 2.1.4.

There are special COI regulations targeting judges, prosecutors, MPs, members of government, members of local, regional councils

This benchmark does not require the monitoring team to evaluate the special regulations in detail, but to ensure they exist and provide meaningful rules governing conflicts of interest tailored to the listed

categories. The CPL provides that special conflict of interest regulations should be put in place for judges (including judges of the Constitutional Court), MPs, members of government, and members of local and regional councils requiring them to report and abstain from participating in decisions in which they have a conflict of interest (article 35-1 CPL).

Prosecutors are subject to regulations, which provide that a prosecutor can be recused if he, his close relatives or family members are interested in the results of the case, or if there exist other circumstances giving grounds for doubts about his impartiality (article 77 CPP) but detailed rules of conflict of interest management and resolution are not further provided in law. However, the Prosecutor General's Office (PGO) approved and published recommendations and detailed guidelines which include practical examples to prevent and resolve conflicts of interest, which were satisfactorily evaluated by GRECO. The PGO also adopted recommendations on restrictions of gifts in 2018 and has published other guidelines, on e-declarations of assets, interests and liabilities and financial control.

Special conflict of interest regulations for judges are provided in the law "On the Judiciary and the Status of Judges" (LJSJ) which considers the following actions as grounds for disciplinary misconduct; a judge's violation of the rules of self-recusal, failure to inform or untimely reporting of an actual or potential conflict of interest of a judge to the Council of Judges, and interference in the process of rendering justice by other judges (article 106 LJSJ). The Council of Judges in its decision N°40 in 2019, provided that judges must take into account any private interests or relationship that have developed between themselves and jurors (personal, friendly, extrajudicial etc.) in order to avoid conflicts of interest in the administration of justice. The CPL's rules governing conflicts of interest are further clarified in the decision of the Council of Judges on "Procedure for control over observance of legislation concerning conflicts of interest in the work of judges and other members of the judiciary", a guide including practical case examples is also available on the website of the Council of Judges. There are also provisions on recusal of judges in the procedural codes (article 75 CPP).[16]

In relation to MPs, the general conflict of interest rules are supplemented by the law "On the rules of Procedure of the Verkhovna Rada of Ukraine" (RPVR) requiring MPs to publically announce in plenary their conflict of interest in order to allow them to take part in discussions and voting on matters in which they have a conflict of interest (articles 31-1 and 37 RPVR). MPs are prohibited from being part of special or investigative parliamentary commissions in which they have a real or potential conflict of interest and are required to inform the Verkhovna Rada of the conflict of interest (article 85 RVPR). In addition MPs are subject to the CPL provisions, namely to recuse themselves from decision making in the relevant body in the event of a conflict of interest (351(2) CPL).

Members of the government are subject to the rules contained in the law "On the Cabinet of Ministers of Ukraine" (LCM) which provides that members of the Cabinet of Ministers are prohibited from using their official position for private interests, from participating in the consideration, preparation or adoption of decisions, executing other powers in matters in which they have a real or potential conflicts of interest and are obliged to report such conflicts to the Cabinet of Ministers (article 45-1 LCM). In the event the Cabinet of Ministers is unable to resolve a conflict of interest, the matter is transferred to the Verkhovna Rada (article 45-1 LCM).

---

[16] Article 75 CPP:
1) An investigating judge, judge or juror may not participate in criminal proceedings: […]
3) if he personally, his close relatives or family members are interested in results of the proceedings;
4) upon the presence of other circumstances which cast doubt on judge's objectivity;

Special regulations for local bodies are provided in the law on "On the local self-governance in Ukraine" (LSU) requiring representatives of local bodies to publicly announce a conflict of interest at the local council meeting, other collegial body (commission, committee, board, etc.), and prohibiting them from participating in the consideration, preparation and decision-making of the relevant body. These conflicts must be entered into the minutes of the meeting of the relevant body.

Benchmark 2.1.5.

The functions of policy development, oversight of the implementation of COI regulations, including the application of sanctions, methodological guidance and individual counselling are assigned to a dedicated agency or unit(s) with the sufficient number of specialized staff and powers to perform their mandate and are applied in practice

Outstanding in Ukraine: The NACP does not have sufficient powers to perform its mandate related to the application of sanctions.

The NACP is responsible for the functions of policy development, oversight of the implementation of conflict of interest provisions, including the application of sanctions for high level officials (articles 255, 251 CAO), and the provision of guidelines and individual counselling (article 12 CPL). The National Police is responsible for drawing up protocols on administrative offenses for the violation of conflict of interest regulations for officials that are not high level and the administrative violations are considered by the courts (articles 221, 257 CAO).

All functions listed in the benchmark are carried out in practice. The analysis undertaken by the NACP contributed to proposals to draft anti-corruption strategy and the NACP is currently finalising the 2nd pilot report on the effectiveness of authorised persons/units, to be published in 2021, which includes a section on the settlement of conflicts of interest. In addition, in 2020, the NACP developed methodological recommendations on the application of the CPL's conflict of interest regulations, which were adopted in April 2021,[17] provided individual clarifications and issues administrative offences protocols (see benchmarks 2.2.3 – 2.2.10). However, during the visit, representatives of the NACP noted that they do not systematically collect information on the resolution of conflicts of interest and do not have a unified register on conflict of interest resolution, which may inhibit their capacity to ensure a comprehensive oversight on the implementation of conflict of interest regulations.

The NACP and the National Police cannot participate in judicial proceedings on conflict of interest decisions or appeal the court decisions. During the visit, representatives of the NACP and the National Police underlined that this posed a key challenge to enforcement of conflict of interest regulations, as they are unable to present their findings of investigative actions in relation to administrative offence protocols to the court, which inevitably undermines the final outcomes in court and efficient enforcement in practice. After the visit, Ukrainian stakeholders reported judicial disputes on conflict of interest regulations applicable to judges. The Council of Judges actions, for example in their decision No. 54,[18] are contested by the NACP,

[17] NACP (2021), Methodological Recommendations from 2 April 2021 on the application of certain provisions of the Law of Ukraine "On Prevention of Corruption" regarding the prevention and settlement of conflicts of interest, compliance with restrictions on the prevention of corruption.
[18] Council of Judges, Decision № 54 of September 24, 2020

which regards these as attempts to allow judges to avoid responsibility for violations of conflict of interest regulations in the courts. This issue will need to be fully assessed during Ukraine's evaluation next year.

The NACP's Department on compliance with conflict of interest legislation and anti-corruption restrictions is responsible for implementing the functions listed in the benchmark. The Department on compliance with conflict of interest legislation, composed of four units, has 29 staff mandated to monitor the implementation of conflict of interest regulations and issue protocols on administrative offenses. The Reporting and Crime Prevention Unit is responsible for methodological and individual counselling and has 7 staff, which on average provided 130 individual consultations in 2020. As a whole, the Unit provided 386 individual consultations on the existence of a conflict of interest and 556 consultations on clarifying conflict of interest provisions in 2020. The NACP also issued 234 administrative offenses protocols in 2020. During the onsite, the NACP representatives noted that staff is sufficient to fulfil the current functions, but it would not be enough if the scope of its activities were to be extended, for example by the creation and maintenance of a gifts or conflicts of interest settlement register. Non-governmental stakeholders also noted that the resources of the NACP in the field of conflicts of interest could be reinforced.

Benchmark 2.1.6.

Individual counselling and sanctioning functions are separated among institutions or within one institution

The function of individual counselling and sanctioning are separated within the NACP's Department on compliance with conflict of interest legislation, composed of four units. Within that department, the counselling and sanctioning functions are separated between two units. The two inspection units are responsible for the NACP's sanctioning function: gathering evidence and drawing up protocols on administrative offences. The Unit on Reporting and Offenses Prevention is responsible for providing consultations and reviewing reports on violations. During the visit, representatives of the NACP confirmed that in practice the sanctioning and counselling functions are separated between these units.

Indicator 2.2. Unbiased and vigorous enforcement of regulations is ensured

Background

The NACP appears active, having issued 234 administrative offenses protocols (1054 including the National Police) in 2020. However, the level of enforcement by the courts of violations of conflict of interest regulations is extremely low and concerning. In addition, the sanctions provided for such violations do not appear to be proportionate or dissuasive. Administrative liability is not provided for all violations, namely in relation to the obligation to transfer of corporate rights and to enforce post-employment restrictions.

Assessment of compliance

Benchmark 2.2.1.

All public allegations of violation of conflicts of interests or other restrictions (i.e. restrictions related to gifts, incompatibilities, divestment of corporate rights, post-employment restrictions) by high-level officials were investigated and grounded decisions were made public

Outstanding in Ukraine: Grounded decisions on public allegations have not been made public

This benchmark is aimed at assessing the objectivity and impartiality of enforcement practices in cases involving high-level officials. For compliance with the benchmark, all public allegations had to be checked by the NACP, investigations or other types of review procedures had to be started and grounded decisions had to be made public.

During the visit, representatives of civil society informed the monitoring team of several allegations of violations of conflicts of interest or other restrictions by high-level officials in 2020. All of these allegations were investigated by the NACP and only in two cases are investigations still ongoing. The NACP underlined that they actively monitor open source information to detect allegations of violations of conflict of interest regulations. The NACP noted that there is no legal requirement to make decisions on conflict of interest violations public and that in practice they only publish decisions on their website when they find evidence of violations. In addition, these publications are brief and would not allow for the reader (other public officials, journalists or citizens) to understand the reasoning behind the decision. The NACP also noted that they are legally required to inform the parties that reported the alleged violation on the outcome of the case and these parties are free to publish the decision on their own or through the media. However, civil society representatives reported that in most cases, they are required to request the information from the NACP on the outcome of an alleged violation they reported or they do not receive a response at all. They also reported that certain information is not published by the NACP due to it falling under the state secrets regime.

Information regarding cases of conflicts of interest is included in the Uniform State Register of Perpetrators of Corruption or Corruption-Related Offences. The range of information disclosed includes a short summary of the case, place of work, position, status of the case in court. However, the published information is generic and does not provide the reader with the understanding on the reasoning behind the decisions of the NACP on the outcomes of the case.

Benchmark 2.2.2.

Dissuasive and proportionate sanctions for violations of COI rules or other anti-corruption restrictions (i.e. restrictions related to gifts, incompatibilities, divestment of corporate rights, post-employment restrictions) are routinely applied in practice

Outstanding in Ukraine: Sanctions are not routinely applied and applied sanctions are neither dissuasive nor proportionate for violations of COI rules or other anti-corruption restrictions; Courts do not enforce COI rules.

Ukraine's sanction regime for violations of conflict of interest regulations or other anti-corruption restrictions are not dissuasive and proportionate and sanctions are not routinely applied in practice.

Ukraine provides for administrative liability for violations of the requirements for the settlement of conflicts of interest (article 172-7 CAO) with a fine between 1700– 3400 UAH (55 – 105 EUR) for failure to report a real conflict of interest and a fine between 3400 – 6800 UAH (214 EUR) for acting or taking a decision with a real conflict of interest. Violations on requirements for the receipt of gifts (article 172-5 CAO) provide for a fine between 1700 – 3400 UAH and confiscation of the gift. For violations of rules prohibiting public officials engaging in certain activities (article 172-4 CAO) provide for a fine between 5100 – 8500 UAH (106 – 268 EUR) and confiscation of income from such activities. In the case of repeat offenders for all of these administrative offenses the amount of the fines are doubled, public officials receive a one-year ban from holding public office and in the case of violations for engaging in certain activities (172-4 CAO) income gained from such activities is confiscated. Disciplinary liability is provided for violations of the obligation to transfer corporate rights (article 36 CPL) and post-employment restrictions (article 27 CPL). The NACP is responsible for entering all officials sentenced for violations of conflict of interest or other anti-corruption restrictions into the Uniform State Register of Perpetrators of Corruption or Corruption-Related Offences (article 59 CPL). Consequently, in light of the range of sanctions available to the courts including complementary sanctions of a ban on holding public office, the sanctions available under the law may be considered both proportionate and dissuasive.

In 2020, enforcement of conflict of interest regulations by the courts was very low, despite the NACP drawing up 234 protocols on administrative offenses. Only four administrative violations were sanctioned by the courts. The average amount of the sanction for the three violations of requirements for the settlement of conflicts of interest (article 172-7 CAO) was 3400 UAH (105 EUR), which is the statutory minimum, and the sanction for one violation of engaging in certain activities (172-4 CAO) was 5400 UAH (166 EUR), just above the statutory minimum of 5100 UAH. These pecuniary sanctions cannot be considered dissuasive and proportionate. The NACP stated that when combined with other complementary sanctions, such as the prohibition to hold public office and the inscription into the Uniform State Register of Perpetrators of Corruption or Corruption-Related Offenses these could be considered dissuasive. However, the NACP noted that enforcement by the courts is so low that it remains impossible to assess both dissuasiveness and proportionality of Ukraine's enforcement of sanctions for violations of conflict of interest rules in practice. The monitoring team considers that applied sanctions are not proportionate and dissuasive in practice.

During the visit, both the NACP and the National Police underlined their concerns over the low enforcement rate by the courts of their protocols of administrative offenses. The main challenge relates to the interpretation of the statute of limitations by the courts, accounting for the closure of a third of all cases. A sanction for an administrative offense must be handed down within six months of its detection and no later than two years after its commission (article 38 CAO) and statute of limitations is even shorter in cases of

disciplinary liability.[19] According to the NACP, there is no consensus in the courts on whether the statute of limitations should begin running from the time of the investigation, the drafting of the protocol or when the protocol is introduced to court. Another challenge relates to courts ruling that cases being brought by the NACP and the National Police should be closed on the grounds that the offences brought to the courts are of an insignificant nature, (article 22 CAO), this accounts for an estimated one fifth of all closed cases. These challenges are all significantly heightened by both the NACP's and the National Police's incapacity to take part in the judicial proceedings.

In addition, the NACP noted that the Ukrainian courts follow a ruling from the High Specialized Court on Criminal and Civil Cases, issued in 2017, providing that conflict of interest regulations are only violated if it can be proved that a private interest prevailed over the public interest in the case in question.

In light of the challenges to enforce conflict of interest regulations in Ukraine, the monitoring team is of the view that alternative solutions could be explored to facilitate the adjudication of cases for violations of conflict of interest provisions.

[19] In relation to disciplinary liability the term varies from one entity to another (e.g. for civil servants in accordance with the Law of Ukraine "On Civil Service" the term of imposing a disciplinary action is six months from the day when the head of the civil service learned or should have learned of the commission of disciplinary offence, excluding time of temporary incapacity for work of a civil servant or his leave, or one year after its commission or separate court ruling).The Labour Code provides that disciplinary action shall be applied no later than one month from the date of its detection, excluding time of temporary incapacity for work or leave. Disciplinary action shall not be imposed later than six months from the date of the offence commission.

Benchmark 2.2.3 – 2.2.10

BENCHMARK	UKRAINE 2020	
	Total	Percentage (%)
2.2.3. Track record of the implemented individual recommendations/instructions issued by the central body regarding COI resolution	386	N/A
BENCHMARK	Total	Per 1 million of population
2.2.4. Track record of sanctions imposed on high-level officials for violations of COI rules or other anti-corruption restrictions (i.e. restrictions related to gifts, incompatibilities, divestment of corporate rights, post-employment restrictions)	4	0.09
2.2.5. Track record of sanctions imposed for failure to report or resolve COI	N/A	N/A
2.2.6. Track record of sanctions imposed for violation of post-employment restrictions including terminated employment contracts	0	0
2.2.7. Track record of sanctions imposed for violation of incompatibilities	0	0
2.2.8. Track record of sanctions imposed for violation of the rules on gifts and hospitality, including confiscated illegal gifts	0	0
2.2.9. Track record of imposed ban on holding public office for serious or repeat violations of COI rules and other anti-corruption restrictions	0	0
2.2.10. Track record of invalidated decisions/contracts as a result of COI	1	0.02

Indicator 2.3. Information on COI is published

Background

The NACP is not legally required to publish its decisions on the resolution of conflicts of interest. In addition, the NACP does not maintain a central registry on conflicts of interest. Information on the implementation of conflict of interest provisions is collected on an ad hoc basis for the purposes of analytical reports, such as the 2nd Pilot Assessment of authorised persons/units. In the framework of Ukraine's asset declaration regime, gifts of public and political officials are published online and are publically available but no central registry is maintained. The NACP collects statistics and publishes data on its own activities online but it does not appear to include data on the outcome of cases resolved by the courts or on conflict of interest resolution although they are required to provide this data by the CPL in their annual reports (article 14-5 CPL).

Assessment of compliance

Benchmark 2.3.1.

Information about the resolution of the reported COI in specific cases is regularly published online

Outstanding in Ukraine: Information on resolution of reported conflicts of interest is not systematically collected and regularly published online

The NACP does not maintain a central registry on the resolution of conflicts of interest. In addition, in Ukraine, there is no legal requirement to publish decisions on the resolution of conflicts of interest, and therefore the NACP states that publication of such data does not take place on a regular basis (see benchmark 2.2.1 above). The NACP was also unable to provide information on the implementation of their individual recommendations on the resolution of conflicts of interest, indicating that such information is not collected (see benchmark 2.2.3 above). During the on-site visit, the NACP noted that only those cases are published on the NACP website, where a violation of conflict of interest regulations was found. The NACP noted that cases involving high-level officials are usually reported in the media or on websites of CSOs, that includes information on the resolution of the conflict of interest, however this should not mitigate the need for the NACP to also make this information publically available.

Benchmark 2.3.2.

Information about the resolution of the reported COI in specific cases is regularly published online

This benchmark requires that as a part of the framework for regulating acceptance of gifts by public officials there is a requirement for the central body or individual agencies to disclose publicly gifts reported by officials. This can be achieved through publicly accessible gift registers or other forms of online publication, which must be regularly published or updated online by a central body or individual agencies. At the same time, this benchmark cannot be met through asset and interest disclosure regimes that require disclosing received gifts in the asset and interest declarations, which usually do not include “prohibited” gifts above certain value that the officials are obliged to report and transfer to the state.

Government referred to the gift disclosure covered by asset declarations of public officials. In Ukraine, public officials are required to declare gifts, above the legal threshold, as income in their asset declarations (see PA-3). During the visit, the NACP stated that a central gifts registry does not exist in Ukraine and that in practice authorities do not collect such information, relying instead on the asset declaration’s regime. However, this does not include the handling of unlawful gifts, which is foreseen by the CPL (article 24 CPL) which are expected to be transferred to the owner according to the procedure defined by the Cabinet of Ministers. This procedure does not provide for public disclosure of such gifts.

Benchmark 2.3.3.

Detailed enforcement statistics on violations of COI rules and other anti-corruption restrictions (i.e. restrictions related to gifts, incompatibilities, divestment of corporate rights, post-employment restrictions) is regularly published online

Outstanding in Ukraine: Enforcement statistics on violations of conflict of interest regulations and other anti-corruption restrictions are not detailed and regularly published online

The information provided by Ukraine demonstrates that the NACP collects most of the information included in the benchmark,[20] however this information is not disaggregated by type of violation and most importantly not published online. The NACP website includes information on the total number of instructions to eliminate conflicts of interest, the number drafted administrative protocols and the number of clarifications provided. General statistics on sanctions imposed by courts are available on the Judiciary's website.[21] However, the total number of sanctions imposed by courts or statistics of enforced disciplinary measures for violations of conflict of interest rules and other anti-corruption restrictions initiated by the NACP and National Police are not published online by the NACP either. In addition, the number of detected violations of conflict of interest regulations, the number of dismissed public officials, the number of invalidated public and employment contracts are also not provided on the NACP's website.

[20] NACP (2021), Monitoring activities of the NACP
[21] Judiciary of Ukraine, Judicial statistics

3 Asset and Interest Disclosure

Ukraine's asset and interest disclosure system is highly advanced for the region. The Law on Prevention of Corruption (CPL) requires a comprehensive disclosure of assets and interests of public officials, civil servants and their family members. The scope of disclosure is broad (table 3.1). The electronic system includes assets and interest declarations in easily searchable open data format providing for a high level of transparency. A verification system is in place and enforcement is increasing. Verification results lead to investigations and sanctions.

In the past, the NACP, the body in charge of asset and interest disclosure, has been criticized for alleged bias in verification and enforcement practices and un-investigated political interferences into verification has been fuelling public distrust. This led to calls of the "re-launch" of the Agency and in 2019 its governance model was changed from a collegial body to a hierarchical agency. Newly recruited leadership and staff now enjoy a higher level of public trust. Recently, the Constitutional Court decision paralyzed the verification of asset declarations and sanctioning process due to declaring some of the related powers of the NACP unconstitutional and abolishing criminal responsibility for intentional failure to declare and false declarations. The powers of the agency quickly restored fully and new amendments that followed later reinstated related criminal law provision. Importantly, these "restored provisions" do not have a retroactive effect and apply to the following cycle of declarations, leaving a time-gap in enforcement and a large number of terminated cases.

Table 3.1. The funding received by the public prosecution service

Section	Objects covered	Value threshold
Real estate	Land plots, residential or other real estate, parking space, etc.	No threshold
Unfinished construction	Any unfinished buildings and land plots where they are located	No threshold
Movable valuables	Jewellery, art, antiques, weapons, animals, gadgets, etc.	Above EUR 8,000 per item
Vehicles	Automobiles, ships, aircrafts, machinery, etc.	No threshold
Securities	Private and public bonds, promissory notes, cheques, derivatives, etc.	No threshold
Corporate rights	Shares, etc.	
Legal persons, trusts and other similar legal arrangements in which declarant or family member is a beneficial owner (controller)	Legal persons in Ukraine and abroad, including non-profit entities. Trusts and other similar legal arrangements (from January 2020)	No threshold
Intangible rights	Intellectual property rights, licences, etc. Cryptocurrencies (from January 2020)	No threshold
Income	Salary, fees, dividends, royalties, interest, insurance payments, charity donations, pension, social benefits, etc.	No threshold
Gifts	Any gifts defined as money or property, benefits, advantages, services,	Above EUR 400 per non-pecuniary gift; above EUR 400 in

	intangible assets received free of charge or at the price below the minimum market price	total for pecuniary gifts from one source during a year
Monetary assets	Cash in any currency, cash outside of banks, money in bank accounts, loans to other persons, bank metals, etc.	Total values of all monetary assets above EUR 4,000
Bank accounts and safe deposit boxes	Bank accounts in Ukraine and abroad regardless of their balance, opened in the name of the declarant or family member by any person; safe deposit boxes (vaults) to which declarant or family member has access (from January 2020)	No threshold
Beneficial ownership of any asset. *Applies only to high- and mid-level officials	Any property or income that formally belongs to a third person but which is in fact controlled by the declarant/family member or from which declarant/family member received/can receive income	Thresholds for relevant declaration items apply
Financial liabilities	Credits/loans received from any person/entity, leasing, insurance contracts, interest paid, insurance, property in mortgage, etc.	If the liability is above EUR 4,000 (since January 2020)
Financial liabilities	Credits/loans received from any person/entity, leasing, insurance contracts, interest paid, insurance, property in mortgage, etc.	If the liability is above EUR 4,000 (since January 2020)
Any employment/engagement in addition to the main job	Any relevant paid or non-paid job	Any employment/engagement in addition to the main job
*Only for the declarant, not family members	No threshold	*Only for the declarant, not family members

Source: OECD/ACN (2020), Anti-corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2016-2019.

Indicator 3.1. Asset and interest disclosure applies to high corruption risk positions

Background

Asset and interest disclosure in Ukraine includes high corruption risk positions. Relevant regulations are provided in the CPL.

Assessment of compliance

Benchmark 3.1.1.

At least the following officials are required to declare their assets and interests: the President, members of Parliament, members of Government and their deputies, heads of executive authorities and their deputies, the staff of private offices of political officials (such as advisors), regional governors, mayors, any other public officials defined as PEPs under the national law

Outstanding in Ukraine: Staff of private offices of political officials and members of the governing bodies of political parties defined as PEPs are not covered by disclosure requirement.

All of the officials listed in the benchmark are required to declare assets and interests (Art. 3, CPL), except for the staff of private offices of political officials as they are not considered public officials under Ukrainian legislation. Members of the governing bodies of political parties of Ukraine who are defined as PEPs are not covered either.

During the on-site visit, the authorities indicated that since the staff of private offices of political officials do not exercise government authority and are not paid from the state budget, and there is no need for them to declare, except for the advisors and assistants to the President who in practice file asset declarations.

Benchmark 3.1.2.

At least the following high corruption risk positions are required to declare their assets and interests: judges, prosecutors, members of the judicial and prosecutorial governance bodies, anti-corruption investigators, officials responsible for public procurement, members or board members of independent regulators and supervisory authorities, and top executives of SOEs

All listed officials are covered by CPL and obliged to submit asset and interest declarations (Art. 3, the CPL).

Indicator 3.2. Asset and interest disclosure is comprehensive and regular

Background

The scope of disclosure is broad and includes cash outside of the financial institutions; valuable movable property (e.g. jewellery, antiques, art) with value above threshold; intangible assets (e.g. intellectual property rights); beneficial ownership of legal persons or any assets; unfinished construction of real estate; membership in civic unions, etc. (Art. 46.1 CPL – see also table 3.1 above). Declarations are regular and public (with exception of specified personal data) in open data format. Several public sources, in addition to the official government portal also provides for the declarations in English.

Assessment of compliance with benchmarks

Benchmark 3.2.1.

Scope of disclosure is broad and allows detection of conflictsof interest and illicit enrichment (unjustified variations of wealth) covering at least: moveable and immovable assets in the country and abroad, vehicles, income including its source, gifts, corporate shares, securities, bank accounts, cash inside and outside of financial institutions, financial liabilities including private loans, outside employment, paid or unpaid activity

All listed assets, interests, liabilities and employment are to be declared (Art. 46.1, CPL).

Benchmark 3.2.2.

Scope of the disclosure includes information on beneficial ownership of companies domestically and abroad (at least in case of politically exposed persons)

Beneficial ownership of companies in Ukraine and abroad are included within the scope of disclosure. This obligation covers all declarants (Art. 46.1, CPL).

Benchmark 3.2.3.

Scope of the disclosure includes information on indirect control (beneficial ownership) of assets (at least in case of politically exposed persons)

It is required to declare so-called beneficial ownership of assets (Art. 46.3, CPL). This requirement covers public officials in responsible positions (Art. 51[3]) and public officials in high-risk positions, as defined by the NACP Decision.

Benchmark 3.2.4.

Scope of the disclosure includes expenditures

A declarant should disclose his/her expenditures that exceed 50 living wages (UAH 113 500 in 2021 or about EUR 3 448 as of January 2021) (Art. 46, CPL).

Benchmark 3.2.5.

Scope of the disclosure includes trusts to which declarant or a family member has any relation

Declarants and his/her family members should declare trusts where he/she is a beneficial owner (CPL Art. 46). Family member is defined as a person who is married to the declarant and children of the declarant until they reach the age of majority - regardless of their cohabitation with the subject.

Benchmark 3.2.6.

Scope of the disclosure includes virtual assets (e.g. cryptocurrencies)

Cryptocurrencies are included in the scope of asset and interest disclosure (CPL Art. 46). Recent amendments to the law introduced the requirement to declare other virtual assets too. Cryptocurrencies are declared under the section 10 of the declaration form (intangible assets) and about 500 declarations had such entries in 2021. The authorities were not aware of any other virtual assets being declared in practice.

Benchmark 3.2.7.

Asset and interest disclosure covers information on family members, at least spouse and persons living in the same household

Information on family members includes spouse, children in their minority, and other persons living in the same household (Art. 1.16.1, CPL).

Benchmark 3.2.8.

Assets and interests are disclosed in one form

There is a single form of declaration that covers all assets and interests. Additionally, there is an obligation to make a notification on a significant income or expenditure and on opening a foreign exchange bank account. The authorities reported during the visit that such notifications are submitted regularly as well. For judges the law also provides for separate “declarations of family ties and integrity”. The NACP stated during the visit, that in practice the general public rely on these declarations to flag any irregularities.

Benchmark 3.2.9.

Declarations are submitted before or upon entering the office, annually while in office, before or immediately upon leaving the office and at least one year later after the termination of employment

Declarations are submitted by candidates for public office covered by the scope of asset disclosure (Art. 45.3), annually while in office (Art. 45.1), before leaving office (Art. 45.2) and in one year after the termination of employment (Art. 45.2.2). During the visit the authorities confirmed that all these declarations are submitted regularly, including declarations after the termination of employment (in 2019 – there were 47 000 such declarations).

Indicator 3.3. An electronic system is in place and publication of information from declarations is ensured

Background

Declarants file asset and interest declarations through a web platform: portal.nazk.gov.ua, where declarations are published automatically without personal data in machine-readable format. The launch of the system in 2016 was preceded by multiple attempts to sabotage and obstruct its functioning by politicians and various forces. After the last monitoring round in 2017, the interference in the efficient functioning of the asset disclosure system in Ukraine continued through the decisions of the Constitutional Court of Ukraine which created a considerable enforcement gap, but all the relevant provisions have now been restored (see indicator 4).

Assessment of compliance

Benchmark 3.3.1.

Declarations are filed through an online platform

All declarations are submitted through a user-friendly online platform, with the exception of declarations of intelligence, counter-intelligence and undercover officers who have an option to submit declarations in paper form. Declarants are informed about administrative and criminal responsibility for submission of false information before submitting the declaration.

Benchmark 3.3.2.

Information from asset declarations is public by default and access is restricted only to narrowly defined information to the extent necessary to protect privacy and personal security

Declarations are public by default at https://public.nazk.gov.ua/. The related provision was declared unconstitutional in 2020 but it was restored shortly. Once a declaration is submitted, its public version (without identifying personal data) is automatically generated and made public. The declarant has 7 days to submit a corrected version in case of any mistakes, which are also publicly available together with the original versions.

The following personal data are excluded from the public versions of the declarations: information on the ID number, taxpayer's number, entry number in the Unified Demographic Register, place of residence, dates of birth, bank account numbers and exact location of real estate (except for the name of the city or settlement) (Art. 47.1, CPL). These exemptions, based on the provisions of the Law of Protection of Personal Data, are narrow in scope and aim at protecting the privacy and personal safety of declarants and their family members.

Nevertheless, public access to declarations of intelligence officers, including the staff of the State Security Service of Ukraine (SSSU) is restricted. The declarations of intelligence officers and classified agents, as well as classified law enforcement officials are not disclosed to protect their identity (Art. 52-1, CPL). A NACP Order regulates submission and verification of these declarations, which is not available for public scrutiny. According to the NACP, intelligence officers whose positions are not classified declare assets in the public part of e-declarations.

The stakeholders interviewed during the on-site visit informed the monitoring team that the Order is withheld from public access without legal grounds. In addition, NGOs reported concerns that in practice these special regulations are not only applied to those positions listed in the CPL, but for other intelligence officers, the leadership of intelligence services at different levels[22] or, e.g., to investigators who do not engaged directly in undercover operations and that the NACP failed to react to these practices. CSOs further stated that there is a general perception that many intelligence officers are abusing these special regulations in order to hide unexplained wealth.[23] In addition, these declarations cannot even be obtained through a freedom of information request in exceptional circumstances when there is a solid justification of public interests outweighing the risks of harm.

The monitoring team notes the public criticism caused by a procedure "covered in mystery" and encourages Ukraine to shed light on these declarations, by informing the public about conducted verifications to demonstrate that the exceptions are applied in accordance with the law and all related public allegations are being investigated and sanctioned. Outcomes of these investigations should be publicised with the protection of personal data, in a way that makes it impossible to disclose the fact that such persons belong to such agencies in line with the applicable law.

Benchmark 3.3.3.

Declarations are available online in a machine-readable (open data) format and aresearchable

All declarations that are available online (see benchmark 3.3.1) are accessible in open data format, can be used and re-used by external systems and search engines. Additionally, the NACP annually publishes the dataset on the Ukrainian Government's Open Data Portal. Declarations are easily searchable by name of declarant, type of declarations, year, position, period of submission, risk positions, or any key word (e.g. car brand or type of property).

[22] Slovo I Dilo (4 June 2020), The end of the era of secrecy: SBU officials showed declarations, but not all.
[23] Radio Free Europe (29 October 2020), Secret staff of the Security Service of Ukraine: Alter Ego of the chief "controller of decency" of the secret service Andriy Naumov (investigation); Radio Free Europe (9 June 2017), Luxury Cars of Security Service of Ukraine.

Benchmark 3.3.4.

Functionalities of the electronic system include automated risk-based ('red flag') analysis of declarations

There is a system of logical and arithmetical control in place that enables automated risk-based analysis of declarations. The module assesses submitted declarations according to pre-established risk criteria and assigns points for a detected irregularity or suspicious data. Declarations with the highest points are selected for full verification by NACP officers.

Civil society expressed concerns that the relevant rules are not available for scrutiny in violation of the law on Access to Information.

Benchmark 3.3.5.

Functionalities of the electronic system include automated cross-checks with government databases, including at least registers of companies, civil acts, land titles, vehicles and tax database

The electronic system interacts with public registries on a continuous basis, comparing data to detect red flags. Declarations are automatically cross-checked with 16 government registers and databases, including register of companies, civil acts register (civil registry does not seem to be included in automatic cross-check after the introduction of the new procedure – see below), real estate register, register of vehicles, and the tax database. However, according to stakeholders, poor data quality in state registers with missing or inaccurate data, and low coefficients of risks as defined by the NACP substantially weaken the LAC.

- Civil society representatives have provided related feedback and the NACP recently adopted new procedures aimed at:
- increasing technical capacities to cross-check declarations with other registers with higher speed;
- formulate precise and detailed "red flags" for cross-checking (i.e., do not limit them to "finding incompatibilities between declaration and external register") but further technical improvements might be necessary to ensure implementation.
- increasing the coefficients of risks for "red flags" defined in the cross-check component.

During the on-site visit, authorities stressed the importance of these changes for increased efficiency of the system and subsequent full verifications, but stakeholders expressed concerns as parts of the new procedure are perceived as NACP avoiding full verification and referring declarations with red flags directly to the law enforcement without full verification (see indicator 4). The monitoring team did not have an opportunity to review these regulations. The information received after the visit suggests that a new procedure has been introduced. These developments will be reflected in the next year's monitoring report on Ukraine.

Indicator 3.4. Unbiased and effective risk-based verification of asset and interest declarations is ensured with a follow-up

Background

The National Agency for Corruption Prevention (NACP) is responsible for verification of asset declarations in Ukraine. Rules governing verification are provided in the CPL and bylaws adopted by the NACP.

Verification is risk-based and is generally perceived as unbiased. The NACP performs accuracy checks, lifestyle monitoring and full verification of declarations, which may lead to a follow up with administrative sanctions or criminal responsibility.[24]

In 2020, the decision of the Constitutional Court of Ukraine invalidated several provisions of the CPL relevant to the powers to verify declarations, thereby obstructing the operation of the NACP for several months, until its powers have been restored by new amendments that were initiated and adopted by the Parliament shortly. The decision also declared Art. 366.1 of the CC unconstitutional providing for criminal liability for intentional acts of inaccurate declarations or and failure to submit a declaration, which were ultimately restored. As a result of this decision, the NACP had to terminate ongoing cases, and these cannot be resumed as the new provisions are not applicable retroactively. This amounts to de facto amnesty for the declarations during the affected period. While the verification is relaunched for declarations submitted in 2021 and onwards, the NACP could possibly consider re-opening these cases ex officio in line with the applicable law.

The NACP was in the process of verifying declarations of the CCU judges when the court made this decision, subsequently, the NACP started the conflict of interest procedure of these judges however, the court has closed the proceedings finding no violation. The Venice Commission criticised the above-mentioned CCU decision as poorly reasoned and adopted in breach of the Court's own procedures and stated that some of the judges of the CCU had been in a position of possible conflict of interest regarding the outcome of the case, since the accuracy of their own declarations had been challenged by the NACP. The Venice Commission had suggested the option of resubmitting the declarations from the previous cycle, not to lose previous investigations, but this has not been included in the adopted amendments.[25] The international community played an important role supporting the NACP and pushing for the restoration of the relevant provisions to not undermine Ukraine's efficient asset declarations system.

Assessment of compliance

Benchmark 3.4.1.

Verification of asset and interest declarations is assigned to a dedicated agency or unit which has a sufficient number of specialized staff and powers to perform its mandate

Outstanding in Ukraine: Powers of the NACP are not sufficient to perform its related mandate

The verification of asset and interest declarations is assigned to the NACP. Its two departments deal with verification, and another one deals with lifestyle monitoring. The NACP has sufficient budget and specialized staff (63 officers) to conduct verifications. The average workload of staff performing full verifications is,[25] and 12 of those perform lifestyle monitoring which is resource consuming. Planned digitalisation and application of AI modules could increase the efficiency.

As regards powers, recently, on August 21, 2021, the NACP was granted access to bank and other information held by commercial institutions and a related court order is no longer necessary, which is a

[24] OECD/ACN (2017), Anti-corruption reforms in Ukraine, 4th round of monitoring of the Istanbul Anti-Corruption Action Plan, pages 65-66.
[25] Venice Commission (2021), Opinion No. 1032 /2021, 6 May 2021, para 10.

step forward. However, there are various remaining obstacles to efficient verification: firstly, the NACP lacks the powers of court representation and sanctioning for detected violations - the NACP initiates a case and collects necessary materials, but it cannot appear in court or appeal its decisions. In addition, according to the NACP, the absence of a register of bank accounts and safety deposit boxes makes it challenging to verify relevant data. Further, receiving data from foreign jurisdictions requires a lot of time and efforts and such requests are often left unanswered, in addition according to the NACP, PGO seems to be impeding the process.[26]

As a result of the CCU decision, the CPL was amended to envisage special procedures for verifications of declarations of judges, including those of the Constitutional Court. After the on-site visit, the monitoring team was informed that a special procedure had been proposed by the NACP to the High Council of Justice and the Assembly of Judges of the Constitutional Court as provided by the CPL (Art. 52^2) but these were not approved. In the absence of these procedures, the NACP continues verification based on the CPL, which foresees the regular provision of information to the HCJ and the Assembly of the Judges of the Constitutional Court at its various stages.

Another issue raised by stakeholders as a “systemic problem” is the special verification regime applicable to the declarations of intelligence officers. The Internal Control Unit verifies these declarations, along with the declarations of NACP employees. During the visit, stakeholders expressed concerns about the lack of a related legal basis, as the mandate of the Unit covers ensuring integrity of the NACP staff and compliance with CPL (Art. 17^1). Furthermore, these declarations are submitted through an alternative system, thus effective verification through automated modules logical, arithmetical control, control on accuracy and completeness of filing in the declaration is not possible. At the same time, the NACP informed that in total 20 full verifications of intelligence officers’ declarations had been conducted in 2020 and 5 administrative protocols were issued and 2 files have been transferred to law enforcement.

The authorities explained that the mentioned Unit has access to classified documents needed for verification and the NACP does not see any issue with the process. The monitoring team did not have an opportunity to interview Internal Control Department representatives. The information provided after the visit refers to the independence guarantees of the Head of the unit provided under CPL (Art. 17^1). The monitoring team reiterates the concern raised in benchmark 3.4.2 about the lack of transparency around the intelligence officers declarations and their verification. It is also unclear why the lifestyle monitoring of this category of public officials is not carried out and why the information about full verification could not be accessible in line with the applicable law.

[26] Slovo I Dilo (20 September 2021), Interview of NAPC Chairman Novikov: "Judges write directly in decisions that they do not understand the law".

Benchmark 3.4.2.

The following declarations are routinely verified:

- Declarations of persons holding high-risk positions or functions;
- Based on external complaints and notifications (including citizens and media reports;
- Ex officio based on irregularities detected through various, including open, sources.

The following declarations are subject to full verification (Articles 51-3 and 51-4 CPL):

- Declarations of high-level officials or high-risk positions;
- Risk levels of certain threshold detected by automated analysis;
- In case a declarant noted in the form that his family member refused to provide information required in the form;
- In case of media reports and other notifications.

Declarations for the verification are selected according to a transparent procedure regulated by an internal order of the NACP from the declarations of high-risk positions, declarations with red flags detected through LAC and individual complaints (including anonymous complaints). Media sources are usually used to monitor lifestyle and may lead to full verification in case irregularities are detected. During the on-site, the authorities informed that out of 47 lifestyle monitoring cases, 21 were based on media sources, only 7 have been sent for full verification. In 2021, out of 51 lifestyle monitoring cases, 18 cases were based on mass media and 19 have been sent for full verification.

The authorities informed that declarations have been routinely verified by the NACP based on all the grounds listed in the benchmark during the reporting period, except for when the verification was blocked due to the CCU decision. Stakeholders interviewed during the visit confirmed this has been the case. As mentioned above, in 2020, the verification of asset declarations was obstructed by the CCU decision declaring part of the NACP's mandate of full verification of declarations unconstitutional. Even though these were restored swiftly and fully at the end of 2020, the majority of the ongoing verifications had to be terminated.

In 2020, the NACP initiated 998 full verifications, 443 were finalized and 555 were suspended due to CCU decision. No. 762 of initiated verifications were for declarations of high-ranking officials. Nine of these verifications were initiated based on LAC and 247 based on complaints. It is not clear what was the basis for verification of the rest of the declarations.

Of 443 verified declarations 9 administrative protocols were issued by the NACP, 14 protocols were transferred to National Police, and 97 reports were transferred to law enforcement. 5 administrative and 6 criminal sanctions have been imposed, but criminal sanctions were cancelled due to CCU decision.

The monitoring team takes note of another point raised by the NACP, which has to do with the efficiency of the existing regulations that requires them to verify even minor discrepancies, and irregularities detected in declarations, even if law does not foresee sanctions for such irregularities. The NACP has to carry out full verification, request supporting documents and clarifications from public officials and related legal entities and draw conclusions. According to the NACP, these minor findings are not worth their time and resources. The new regulations that are in the pipeline, will reportedly remove this requirement. During the on-site, the stakeholders voiced concerns that the NACP may be avoiding conducting full verification and new amendments provide for submitting information to the law enforcement agency without full verification,

based solely on automatic LAC. In the view of the stakeholders, this will weaken the verification regime. The monitoring team has not been provided with these draft rules.

Benchmark 3.4.3.

Risk-based (red-flag) analysis is used to choose declarations for verification

A module for automated analysis of declarations is based on red flags. It checks data within in declarations of the same person and cross-checks them with external registers and databases. Following such automated analysis, each declaration is assigned a risk rating that may trigger its full verification. Discrepancies revealed during the LAC is a ground for full verification of declaration, (CPL Art. 51-3). According to the NACP, before the CCU Decision, full verification of up to 10 declarations have started based on the results of LAC.

The monitoring team did not have an opportunity to analyse the new procedure. The relevant analysis will be included in the next report.

Benchmark 3.4.4.

Anonymous complaints that include verifiable information trigger the verification

Anonymous reports on incomplete or false data in declarations can also trigger full verification of declaration. Full verification based on anonymous reports has not been conducted in the reporting period.

Benchmark 3.4.5.

Verification is prioritised to ensure a reasonable number of verifications considering available resources

Prioritization of declarations for the purposes of verification is based on an internal procedural regulation (adopted in May 2020, this document was changed into the recommendation in 2021) available on the NACP's website. The Agency verifies declarations of top government officials occupying high-risk positions, declarations flagged by the automatic risk assessment system and those referred to the NACP by individual complaints in equal proportions. The government establishes a benchmark of the number of declarations to be verified annually (1000 declarations in 2020) and according to the NACP it has sufficient resources to meet this target. During the on-site, the government confirmed that resources are sufficient and further envisaged changes in LAC will make the process more efficient.

Benchmark 3.4.6.

There is a wide perception among the main stakeholders that verification is unbiased and free from political or any other undue interference

The evidence collected as a part of the monitoring, including at the on-site visit suggests that stakeholders consider verification unbiased and free from political or any other undue influence. Representatives that provided feedback to the monitoring team were not aware of any signs of undue influence and/or bias from the NACP officials. This is a substantial positive change since the last round of monitoring. Until the change of leadership in 2020, the NACP did not enjoy public trust and there was a wide perception among the main stakeholders that the NACP was biased when conducting verifications. The feedback received as a part of the consultations on the draft report suggested emerging concerns, but these could not be analysed in detail at this stage.

At the same time, stakeholders interviewed during the on-site visit stressed the challenges related to the CCU decision, lack of enforcement by courts and lack of transparency of the verification of the SSU declarations by NACP Internal Control Unit, that leaves the main stakeholders with the perception that violations by the intelligence officers, including SSU staff, revealed among others by investigative journalists are not followed up as appropriate.

The monitoring team is of the view that these issues could be included in the forthcoming external evaluation of the NACP. The Public Council of the NACP could also monitor the situation. This could help shed light to the issue and possibly answer the questions that civil society and public may have. This way the NACP's accountability and independent exercise of mandate could be further demonstrated (on external evaluation see PA 1).

Benchmark 3.4.7.	Ukraine 2020	
	Total	Per 1 million of population
Track record of cases referred to law enforcement bodies based on the verification of declarations	97	0.4

Indicator 3.5. Dissuasive and proportionate sanctions are enforced

Background

Criminal, administrative and disciplinary sanctions are envisaged for violations related to asset declarations. CCU decision that rendered related criminal responsibility unconstitutional led to termination of criminal cases pending and only administrative liability remained. In a legal limbo, administrative liability was in place for a lesser offence and no responsibility was provided for acts that are more serious. Along with poor reasoning, the Venice Commission criticised interference by the CCU without proper justification, with the powers of the Parliament to define criminal liability. Criminal responsibility was reinstated but first

with a lesser sanction (one year of imprisonment), and later fully restored with the amendments of 29 June 2021, but not applicable retroactively.

Assessment of compliance

Benchmark 3.5.1.

Dissuasive and proportionate sanctions for violating asset and interest disclosure rules are routinely applied in practice

Outstanding in Ukraine: There is a lack of routine application dissuasive and proportionate of sanctions in practice

Intentional inaccurate declarations above the threshold of EUR 18 000 (Art. 366^2 of the CC) and intentional failure to submit declarations (Art. 366^3 of the CC) entail criminal responsibility, with the following sanctions: fine, community service, restriction of liberty or imprisonment up to 2 years with the ban on certain activities or holding certain positions up to 3 years. Inaccurate declarations within the range of EUR 7 250 to 18 000 are punishable by administrative sanctions. *Late submission* is an administrative offence punishable by a fine (Art. 172-6 of CAO). Other violations may lead to disciplinary sanctions.

The monitoring team considers that sanctions provided by law their different types, variety and range make them proportionate and dissuasive, but their practical application in the reporting period, cannot be regarded as such also taking into account the enforcement gap due to CCU decision, and general low level of enforcement by courts, despite NACP's commendable efforts to increase this level. As in case of the enforcement of conflict of interest regulations (see PA 2 benchmark 2.2.2) in light of the enforcement challenges, the monitoring team is of the view that alternative solutions could be explored to adjudicate on related cases.

20 cases of HACC had to be terminated due to decriminalisation of the relevant article, in total around 500 cases were terminated due to the CCU decision.

Benchmark 3.5.2. – 3.5.7.

BENCHMARK	Ukraine 2020	
	Total	Per 1 million of population
3.5.2. Track record of sanctions imposed for non-submission or late submission of declarations	45	1
3.5.3. Track record of sanctions (measures) imposed for conflicts of interest (including for violation of rules on incompatibilities, gifts, divestment of corporate rights, post-employment restrictions) based on the detection through verification of declarations	N/A	N/A
3.5.4. Track record of sanctions (measures) imposed for illicit enrichment (unjustified assets) based on the detection through verification of declarations	0	0
3.5.5. Track record of administrative sanctions for false or incomplete information in declarations imposed on high level officials	39	0.8
3.5.6. Track record of criminal sanctions for false or incomplete information in declarations imposed on high level officials	N/A	N/A
3.5.7. Track record of sanctions following verification of declarations based on media or citizen reports	N/A	N/A

Note: Most of the requested statistics could not be provided. This is mainly due to the differences in definitions of various violations. For example, violations under benchmark 3.5.2 are spelled out in two different articles that also include other violations.
Benchmark 3.5.2 Data includes criminal convictions for intentional failure to submit declaration and submission of deliberately unreliable information (Art. 336-1 of the CC), so it does not fully match the benchmark which is concerned with non-submission and late submission. Ukraine could not provide information about late submission of declarations, which is only a part of an administrative violation defined by Art 172-6 of CAO that includes other related violations too (for example failure to notify of opening of the foreign currency account).
Sources: The population of Ukraine is 44 million according to the information provided by the World Bank: https://www.worldbank.org/en/country/ukraine/overview

Benchmark 3.5.8.

Detailed statistics on the verification of declarations and applied sanctions is regularly published online

Detailed statistics on verification of declarations and applied sanctions are not published online. The NACP publishes information about the launch and completion of each verification, and the detailed reports on each case that includes information about referral of a case to the law enforcement agency if relevant grounds are in place.[27] In addition, the NACP runs a register of persons who committed corruption related

[27] NACP (2021), Monitoring the activities of the NACP, Results of verification of declarations.

offences. This way application of sanctions is transparent. At the same time, the benchmark requires detailed statistics which is not available online.

Statistics on the verification of declarations should include at least the following: 1) number of verifications started and concluded in the reporting period; 2) number of verifications by the grounds which triggered the verification; 3) number of verifications by the type of declarants whom such verifications concerned; 4) number of verifications by their outcomes; 5) average duration of the verification of declarations; 6) number of cases referred to law enforcement bodies for follow up.

Statistics on the applied sanctions for violations related to declarations should include at least the following: 1) number of administrative, criminal sanctions applied for each of the offences related to declarations; 2) number of offenders sanctioned with the breakdown by the type of public officials; 3) number of different types of punishments applied; 4) number of sanctions appealed against and number of sanctions upheld or overturned on appeal.

4 Protection of Whistleblowers

Ukraine has a comprehensive legal framework for protection of whistleblowers reporting corruption based primarily on the law on Prevention of Corruption (CPL) and the Criminal Procedural Code (CPP). The two recent amendments to the CPL, in 2020 and 2021, strengthened the whistleblower protection framework and provided for the launch of Unified Portal of Whistleblower Reports, which is planned to be operational in 2022.

The Unified Portal is in the process of establishment. It will be administered by the NACP. Diverse protection guarantees are in place and most of them are applied in practice. There is a dedicated authority in Ukraine for whistleblower protection. Ukraine's other innovations include the NACP's legal aid regime to represent whistleblowers in court, the extension of protections to the whistleblowers' family members, allowing the whistleblower's full discretion in choosing among reporting channels and financial incentives for whistleblowers in criminal corruption cases. The whistleblowing system in Ukraine in many aspects exceeds the pilot indicators and the practice in Ukraine is commendable.

Reporting is tailored to anti-corruption and law enforcement bodies. More generally in the public sector reporting channels are only partly operational. There is less priority placed on reporting corruption-related violations, for example in the cases of a conflict of interest or asset disclosure breaches. Awareness on reporting channels is not sufficient. To continue the development of the Ukraine's whistleblower protection framework the resources of the NACP's responsible unit should be reinforced in the future.

Indicator 4.1. The whistleblower protection is guaranteed in law

Background

Ukraine's whistleblower protection legal framework is overall satisfactorily. Transfer of burden of proof to employer in whistleblower cases has proper legal grounds. Two laws define whistleblower and numerous protection guarantees are in place and protections extend to whistleblowers in the private sector. However, personal protection is only provided to whistleblowers who report on criminal offenses, and therefore does not cover whistleblowers who report on administrative or disciplinary corruption related violations.

Assessment of compliance

Benchmark 4.1.1.

The law guarantees protection of individuals who reported about a corruption-related wrongdoing that they believed true at the time of reporting and who disclose this information using internal or external channels

The Law on Prevention of Corruption (Article 1) defines whistleblower as any natural person reporting possible facts of corruption, corruption-related offences or other violations of this Law, which covers corruption-related wrongdoing. The person shall have a belief that the information is reliable. Under the CPL to qualify as a whistleblower the information must have been learned in connection with his employment, professional, economic, public, scientific activity. Accordingly, if the whistleblower received this information from a third party outside his/her workplace or became aware of it after the termination of their employment, they would not qualify as a whistleblower. Reporting can be done through internal, external channels[28] or by making a public disclosure[29] (Article 1 and Article 53-2).

The second definition within the Criminal Procedure Code under Article 3(16[2]) defines as a whistleblower any natural person who reports a corruption criminal offence to a pre-trial investigation body. The person needs to believe in the accuracy of information.

According to NACP guidance the belief in the accuracy of information means that the person is confident that the information he reports may indicate possible facts of a corruption related offense based on his life experience, age, professional experience and other circumstances.[30]

The Law on Prevention of Corruption includes a procedure to verify submitted notifications and requires the whistleblower to provide factual data confirming the possible violation. As explained by Ukrainian authorities during the on-site visit, the level of detail is not specified and so far recognising a person as a whistleblower has not been a problem due to insufficiency of facts reported, rather the person would not qualify as a whistleblower if, for reports on administrative or other corruption related violations, information is not obtained in a work-related context (for example, general citizen appeals). The monitoring team also noted that in practice the NACP has limited powers to conduct verifications. Only in cases of reprisal, verification is carried out. Ukrainian authorities also explained that no verification is needed for reports submitted in line with the Criminal Procedure Code (a report on criminal offence is automatically considered a whistleblower report) as soon as the report is entered into the unified registry of pre-trial investigations. The person having made the report would only need to present the receipt given to them by the pre-trial investigative body that opened the criminal case in order to claim the protections provided under the CPL.

[28] Referred in the Law on Prevention of Corruption as “regular channels of reporting”.
[29] Referred in the Law on Prevention of Corruption as “external channels of reporting”, including media, journalists, public associations, trade unions etc.
[30] NACP (2021), Regarding the legal status of a whistleblower.

Benchmark 4.1.2.

The whistleblower legislation extends to both the public and the private sector employees

Whistleblower protection extends to any person. Both private and public sector employees can submit a whistleblower report and receive protection in case of reprisal. The law applies to employees, self-employed persons, shareholders and board members, paid or unpaid volunteers and trainees, contractors, sub-contractors and suppliers, persons whose employment relationship has ended and those engaged in a recruitment process and as such is compliant with the benchmark.

Statistics on number of reports by sector of reporting persons (private or public sector) are not made. The Ukrainian anti-corruption authorities said during the on-site visit that they have received reports from private sector.

Benchmark 4.1.3.

The law puts on the employer the burden of proof that any measures that were taken against a whistleblower were not connected to his or her report

The reversal of the burden of proof onto the employer in cases of retaliation against a whistleblower is provided for in the Civil Procedure Code (Article 81, part 3) and in the Code of Administrative Procedure (Article 77, part 2). The reversal of the burden of proof extends to situations where retaliation is directed at relatives of the whistleblower.

In addition, the NACP plays a key role in ensuring that courts are made aware of these new provisions, facilitating the development of an aligned interpretation by the courts. Ukrainian authorities stated that the NACP reminds judges of the reversal of the burden of proof in all judicial proceedings the NACP is involved on behalf of whistleblowers.

Benchmark 4.1.4.

The law provides for the following key whistleblower protection measures:

- protection of whistleblower's identity;
- protection of personal safety;
- release from liability linked with the report;
- protection from all forms of retaliation at the workplace.

Outstanding in Ukraine: Personal safety is limited to persons participating in criminal proceedings

All listed protection measures must be explicitly provided in the primary law for the benchmark to be met. If one of the measures is not clearly stipulated in the law, the country will not be compliant.

- **Protection of whistleblower's identity.** The Law on Prevention of Corruption (Article 53[3]) prohibits disclosing identity of the whistleblower and his relatives to third parties and persons mentioned in the report. A reasoned decision may be taken to disclose the identity without consent. In such case, the whistleblower must be informed about such disclosure, including its reasons and persons to whom the disclosure is made. Unlawful disclosure of a whistleblower's identity is an administrative offense under Article 172-8 Code of Administrative Offenses[31].

In addition, the whistleblower retains a right to confidentiality during administrative proceedings (Articles 256 and 272 CAO) in criminal proceedings the decision to take measures to protect the identity of a whistleblower rests with the investigator, coroner, prosecutor, investigative judge or the court.[32] The authorities referred to practice to protect identity in court proceedings such as changing name, voice, video conferences. The unified portal will increase the protection of identity, as each institution will have a safe reporting channel within the portal.

- **Protection of personal safety.** In cases of threat to the life, health and property of whistleblowers or their relatives law-enforcement authorities may apply measures provided in the Law "On Ensuring the Safety of Persons Participating in Criminal Proceedings". Hence, this protection can only be extended to whistleblowers participating in criminal proceedings. Whistleblowers who report, for instance, administrative or disciplinary offenses would not be covered.
- **Release from liability.** The whistleblowers can be released from liability for violations of official, civil, labour or other duties or obligations related to their report (Article 53[8] CPL). Non-applicability of confidentiality clauses in employment or other contracts is included. Whistleblowers are released from liability from any property or moral damage caused by reporting, which is reflected in both CPL and under Articles 94 and 288 Civil Code, unless the report was knowingly false or inaccurate and may be subject to refutation (Article 277 Civil Code). In addition, whistleblowers are not liable for criminal offenses on the violation of privacy (Article 182 CC) and the violation of commercial or bank secrets (Article 231 CC).
- **Protection from all forms of retaliation.** The CPL prohibits any form of retaliation against the whistleblower or his relatives in the workplace by his superior or employer in relation to his report (Article 53[4] CPL) and captures the benchmarks requirements. This is further enshrined in Ukraine's Labour Code, which prohibits any discrimination in employment, including reporting possible facts of corruption or corruption-related offenses and other violations of the Law of Ukraine "On Prevention of Corruption", as well as assistance to a person in making such reports. The Labour Code provides the same remedies as the CPL to whistleblowers and their relatives.

---

[31] Code of Administrative Offenses Article 172-8 "Illegal use of information made known to a person in connection with the performance of official or other statutory powers" (Illegal disclosure or other use by a person in his own interests or in the interests of another natural or legal person of information about the whistleblower, his relatives or information that may identify the person of the whistleblower, his relatives, who became known to him (them) in connection with the performance of official or other powers specified by law, entails the imposition of a fine of one thousand to two thousand five hundred non-taxable minimum incomes of citizens with deprivation of the right to hold certain positions or engage in certain activities for one year).

[32] Article 3(2) and Article 15(a) "On ensuring the safety of persons participating in criminal proceedings"; Article 130-1 (6) CPC.

Benchmark 4.1.5.

The law provides for the additional pre-retaliation protection measures:

- protection of whistleblower's identity;
- protection of personal safety;
- release from liability linked with the report;
- protection from all forms of retaliation at the workplace.

All listed pre-retaliation measures must be provided in the primary law for the benchmark to be met. If one of the measures is not clearly stipulated in the law, the country will not be compliant.

- **Consultation on protection.** The law on Corruption Prevention provides that the National Agency ensures guidance and consultation to whistleblowers on protection covered under the law.[33] In 2020, the NACP provided 33 telephone consultations, 16 written explanations and 5 clarifications were posted on the NACP's website. The NACP and other authorities required to implement internal or regular channels are responsible for providing guidance on protection to whistleblowers (articles 11(13) and 53-9 CPL).
- **Provisional protection.** The Civil and Administrative Procedure Codes provide that whistleblowers may be granted interim protection measures, for example, the suspension of a decision or act by an employer while a case is pending. Whistleblower can claim provisional protection from the moment of making the report in cases of retaliation or other adverse actions taken against them (article 53-3 CPL). .
- **State legal aid** was extended to whistleblowers in Ukraine after amendments to the Law on Free Legal Aid entered into force on 1 January 2020. Whistleblowers can use the state's legal aid framework. Whistleblowers have the right to free primary and secondary legal aid. Legal aid is provided by the Coordination Centre for Legal Aid Provision under the Ministry of Justice and free legal aid centres. During the on-site visit, Ukrainian authorities informed that from 1 January 2020 to 31 of May 2021 legal aid was provided in 31 cases, mostly labour cases. In addition, whistleblowers may be represented by the NACP at any stage of judicial proceedings (Article 53 CPL). This meets the benchmarks requirements.

[33] NACP, Clarification "Regarding ensuring the whistleblower's right to receive information".

Box 4.1. Diverse legal support to whistleblowers in case of reprisal

Since 2020, in Ukraine whistleblowers who suffer retaliation can request free state legal aid. The whistleblower can use all types of legal assistance provided for by the Law on Free Legal Aid. The role of legal aid is to assist in preparing documents for state institutions or the court. For the period from 1 January 2020 to 31 of May 2021, state legal aid was provided to whistleblowers in 31 cases.

Whistleblowers can also be represented by the NACP in the court. At the time of the on-site visit, the NACP was dealing with 61 such cases. The role of the NACP is to provide explanations and support. The NACP acts as an independent counsel of the court. Moreover, whistleblowers can also engage their own attorney and request costs to be covered by the state, but it remains unclear if this measure has already been applied in practice.

Benchmark 4.1.6.

The law provides for the following post-retaliation remedies:

- appropriate compensation;
- reinstatement;
- medical and psychological aid.

All listed post-retaliation remedies must be provided for in the primary law for the benchmark to be met. If one of the measures is not clearly stipulated in the law, the country will not be compliant

Appropriate compensation. Whistleblowers can claim compensation in civil proceedings (Article 280 Civil Code). Whistleblowers can request reimbursement of expenses related to their report, legal fees and court fees (Article 53^3(9) CPL). For work-related retaliation, whistleblowers are guaranteed the restoration of their rights for lost, past and future earnings as provided in the CPC (Article 53^4 CPL and Article 130-1 CPC). Ukraine exceeds the benchmark in that it provides rewards for whistleblowers in criminal proceedings capped at 10% of the proceeds of the offense (Article 53^7 CPL).

Of the 12 cases resolved in favour of whistleblowers, compensation in the total amount of UAH 2,672,329 was awarded in 8 cases. In 1 case, the amount of compensation was not defined by the court.

Reinstatement. A whistleblower can be reinstated to his position in cases of dismissal or transfer (Article 53^4 CPL and Article 235 Labour Code). If he/she refuses to be reinstated, then six months of their average salary is granted. In the case that the position cannot be reinstated, the whistleblower can receive two years of their average salary.. This meets benchmark's requirements.

The right to psychological aid for whistleblowers is guaranteed in the Law (Article 53^3(11) CPL) but the Ukrainian authorities confirmed during the on-site visit that in practice there is no body/entity assigned to provide it. However, given that it is provided in the CPL the benchmark is met. Medical aid is not expressly provided in the CPL or another primary law and therefore there is no possibility to claim compensation for medical treatment tailored to whistleblowers. Medical aid is defined as an individual right (Article 283 Civil Code) and therefore if violated may be claimed under the general compensation regime (Article 280 Civil Code).

Indicator 4.2. Effective mechanisms are in place to ensure that whistleblower protection is applied in practice

Background

All three reporting channels are provided in the law. In practice external channels of the NACP, NABU and National Police are available and work properly. The internal channels in the public sector have been implemented only partly and it will be solved by Unified Portal. Anonymous reporting is provided. The NACP is designated as the central agency with a robust mandate and powers to enforce compliance with the law and provide protection to whistleblowers. Ukraine meets the indicator's requirements by allowing direct reporting through all channels and the power of the NACP to represent whistleblowers at any stage of judicial hearings. Ukraine's whistleblower framework is relatively new and is still in the process of implementation.

In 2020, there were 71 cases following retaliation against whistleblowers that were in court; 34 are still ongoing and 25 have been concluded with 12 in favour of the whistleblower.

Assessment of compliance

Benchmark 4.2.1.

All three types of channels for reporting are available, including: protection of whistleblower's identity;

- internal at the workplace (at least in the public sector);
- external (to specialized, regulatory, law enforcement or other relevant state body);
- possibility of public disclosure (to media, public associations).

All three channels have to be available in law and exist in practice for this benchmark to be met.

The law on Corruption Prevention provides for all three channels for reporting – internal, external (referred as "regular" in the Law) and the possibility of public disclosure (referred as "external" in the Law). Both private and public sector employees can use the external and public disclosure channels. The law provides for establishment of internal channels for reporting corruption in the public sector, including in state-owned enterprises. Such channels also should be put in place in private companies participating in public procurement. Internal channels shall be secure and confidential or anonymous communication channels to the head or authorized unit (person) for corruption prevention in the body or legal entity where the whistleblower works. This corresponds to the internal channel of the benchmark.

External channels have been created only by entities in the field of anti-corruption - the NACP, NABU and the National Police. Amendments to the CPL introduced on 26 June 2021 clarified and extended the list of authorities required to set up external channels to now include the State Bureau of Investigation (SBI) and the General Prosecutor's Office (GPO). [34] However, information was not provided to the monitoring team whether the SBI's and GPO's external channels are operational or not. However, the law requires other state bodies (pre-trial investigation bodies, bodies responsible for monitoring compliance with the law in

[34] Law of Ukraine on amendments to the Law of Ukraine "On Corruption Prevention" concerning regulation of selected issues of protection of whistleblowers.

relevant areas, other government agencies, institutions and organizations) to create external channels too. In relation to the private sector, the duty to create internal channels only extends to publicly owned companies and those participating in public procurement (Article 62).

Public disclosure can be made to individuals or legal entities, including through the media, journalists, public associations, trade unions.

Reports can be made orally, in writing, through special telephone lines, official websites, or other electronic means of communication. Disclosure of state secrets and restricted information is prohibited, like in many other countries.

Ukrainian authorities indicated that 3469 reports of corruption were received by NACP. It was also said that 11% of notifications were qualified as whistleblower reports with the remainder treated as citizen appeals, where the same standards of protection do not apply. [35]

The NACP monitors that internal and external channels are created by public authorities and compliant with the CPL's provisions and the NACP's own guidelines. During the on-site visit, Ukrainian authorities indicated that not all authorities have created reporting channels. About 85% of agencies authorised persons have been appointed. NACP conducts inspections of reporting procedures and how internal reporting works. NACP can issue order in case of failure to create reporting channel. During the visit, both the authorities and representatives of international organisations, civil society and business organisations stated that internal channels have not yet been sufficiently established, but that the Unified Portal of Whistleblower Reports will address this.

Amendments to the law on the Prevention of Corruption, which entered into force on the 26 June 2021, establish the Unified Portal of whistleblower reports, which is expected to be put in place in 2022. It will provide a single and digital platform to submit internal reports, but also all other reports will need to be registered in this platform.

Benchmark 4.2.2.

Anonymous whistleblower reports are accepted and protection is granted to anonymous whistleblowers when they have been identified

Anonymous reporting is provided as a protection to whistleblowers (Article 53-3(7) CPL), accordingly both internal and external channels are required to provide for anonymous reporting (Article 54(4) CPL). Consequently, an anonymous whistleblower retains the same rights as persons reporting confidentially, on the condition that they can prove that they were the author of the report in question. Upon supplying the relevant supporting documentation to the NACP and the verification of this documentation by the NACP, the anonymous whistleblower is granted the status of a whistleblower and the protection measures it implies. During the visit, the NACP noted that in practice they have never been confronted with a situation where an anonymous whistleblower claimed protection.

During the visit, the NACP noted that the new Unified Portal of whistleblower reports will streamline the procedure for granting protection to anonymous whistleblowers by providing an identification number upon

[35] Law of Ukraine "On Citizens Appeals".

having made the report allowing them to use this identification number as proof of their whistleblowing status.

Benchmark 4.2.3.

There is a dedicated authority responsible for providing protection and ensuring oversight, monitoring, collection of data regarding the protection of whistleblowers that has sufficient number of specialised staff and powers to perform its mandate

The NACP is the dedicated authority for whistleblower protection. It is mandated to receive reports, cooperate with whistleblowers, ensure their legal and other protection, issue instructions requiring the elimination of labour violations and in relation to other rights of whistleblowers, as well as to initiate proceedings in cases of retaliation against whistleblowers (Article 11(13) CPL). The NACP monitors the implementation of law and protection framework.

In the NACP, these responsibilities are carried out by the Unit for Cooperation with Whistleblowers, within the Department for the Prevention and Detection of Corruption (DPDC).[36] It enjoys the necessary powers to carry out its mandate (Article 12 CPL). Ukraine is therefore compliant with this part of the benchmark.

The Unit's work is exclusively dedicated to the implementation of whistleblower protection and it is considered specialized within the meaning of the benchmark.

The Ukrainian authorities indicated that the Unit for Cooperation with Whistleblowers is composed of nine staff positions (at the time of on-site visit six staff members were actually recruited). Although the concern was raised by some non-governmental stakeholders that the NACP's staff is not sufficient and suggested to increase the number of specialized staff dealing exclusively with the whistleblowers' protection and reports that require processing and support of the NACP.

During the on-site visit, Ukrainian authorities admitted that NACP's mandate is broad, but they consider that it has sufficient resources and can deal with its mandate. The monitoring team considers that the NACP has sufficient staff for its current mandate but that in order to improve in some of its activities, for example data collection, analysis and better oversight of internal channels, additional staff would need to be recruited. After the on-site visit authorities stated that due to the COVID-19 global pandemics, as well as the decision of the Constitutional Court of Ukraine of 27.10.2020 № 13-p/2020, the NACP has somewhat limited powers to conduct verifications, including protection of the whistleblowers who require the actual presence of an authorized person.

Indicator 4.3. The public is aware of and has trust in existing protection mechanisms

Background

Ukraine's whistleblower framework is new and evolving to become fully operational. The NACP and NABU's channels are perceived to be efficient and trustworthy, however the same cannot be said for

[36] NACP (2021), Department for the Prevention and Detection of Corruption.

internal channels. In addition, there remains a lack of trust in the general framework that reporting is safe and will lead to meaningful change. The Unified Portal is expected to streamline reporting and, if correctly implemented, could further increase the trust of citizens in Ukraine's whistleblowing framework. In 2020, the NACP monitored the efficiency of the CPL's whistleblower framework and published the report "Effectiveness of Anti-corruption units". The NACP's analysis was used in developing the Anti-Corruption Strategy 2021-2025 and the draft bill 3450. However, the NACP does not yet collect all datasets provided by the indicator. The Unified portal is expected to facilitate data collection by the NACP.

Assessment of compliance

Benchmark 4.3.1.

There is a wide public perception among the main stakeholders that reporting channels are trustworthy and efficient.

Outstanding in Ukraine: Awareness about whistleblowing channels and trust it is safe and meaningful to report is lacking

The legal framework for whistleblower protection is considered efficient and the quality of law is perceived as good, but practical implementation is lacking. Overall external channels created by the NACP and NABU are considered efficient and trustworthy, but this is not a predominant assessment of the framework's mechanisms as a whole. A recent NACP's report[37] noted that in the first six months of 2020 only 50% of designated authorities had established internal procedures for reviewing whistleblower reports. During the visit, the NACP noted that 85% of designated authorities had established internal procedures for reviewing whistleblower reports.

Awareness about reporting channels and communication about possibilities to make a report are not sufficient. In addition, channels are not perceived as autonomous. Oversight by the NACP over internal channels could improve. Training to authorised persons is needed. Cases lack follow-up. Citizens fear retaliation and there are cases of retaliation against reporting persons. Also, still certain legacy exists and image of reporting is not necessarily positive. Besides, practice shows that being a whistleblower in Ukraine is a difficult choice to make leading to risks of reputation and career.[38]

It is expected the Unified Portal of Notifications of Corruption will streamline reporting process and reinforce the guarantee of confidentiality and safety of reporting channels. The idea to create a Unified Portal is well received by civil society. A single portal and more information and statistics on whistleblowing and protection were mentioned by civil society as factors that could positively increase perception of whistleblowing to be trustworthy and efficient.

[37] NACP (2020), Report on the effectiveness of Anti-Corruption units, pp. 82-85.
[38] Pravda (10 February 2021), "The detective who was not protected: the story of Oleg Polishchuk".

Benchmark 4.3.2.

Detailed statistics and other information on whistleblower reports and whistleblower protection is regularly collected, analysed and used as a basis for reform of anti-corruption policy, aggregated information is also published

Outstanding in Ukraine: Statistics on whistleblower reports, protection requests and breaches of confidentiality are not disaggregated and do not fully correspond to the benchmark's requirements

The NACP, as part of its mandate to monitor implementation of the law on Prevention of Corruption, develops an annual report and includes in it statistics on whistleblowing and notifications on corruption. As to 2020, information is collected about whistleblower reports received by the National Police (494) and NABU (15). As for the NACP, information is available generally on notifications (citizens' appeals) about corruption received by the NACP (namely, 3469 notifications of corruption).[39] Ukraine indicates that the NACP is working to introduce a system of identification of those reports of potential violations of the Law of Ukraine "On Corruption Prevention", which are submitted by whistleblowers.

Disaggregated Information on protection is not collected (by type of protection). However, information was presented during the visit on requests for state legal aid and the number of consultations provided to whistleblowers by the NACP. In addition, information on the type of protections sought by whistleblowers in courts was also provided, but this information is not systematically collected.

In addition, the NACP collects the number of court proceedings related to the protection of whistleblowers, the number of executed orders on the elimination of violations of the CPL and on the number of administrative offences concerning the protection of whistleblowers. Moreover, the Ukrainian authorities provided the number of criminal cases initiated as a result of a whistleblower report, however, these also include general reports on corruption (citizen's appeals) and would not qualify as whistleblower reports.

However, data is not available for some data sets included in the benchmark, namely whistleblower reports received through internal channels, external channels, number of protection requests for all protective measures, as well as statistics on breaches of confidentiality. The NACP indicated after the virtual visit that most of these issues will be addressed by the creation of the Unified Portal of Whistleblower reports, which will be assessed in next year's report.

The statistics currently collected by the NACP are included in report on the effectiveness of anti-corruption units (August 2020). The data that the NACP regularly collects contributed to the formulation of Ukraine's draft Anti-Corruption Strategy for 2021-2025 and the development of the draft Bill 3450 which included, among other amendments, the creation of a Unified Portal for reporting corruption. Statistics on courts cases involving whistleblowers is also available on the NACP's website.

[39] NACP (2021), Implementation of Anti-corruption Policy in 2020.

Indicator 4.4. The whistleblower protection system is operational and protection is ensured in practice

Background

During the course of the evaluation, the data provided by the Ukrainian authorities on protection measures provided to whistleblowers has varied throughout. The monitoring team is not aware of any cases where protection was not provided to a whistleblower, given that the cases underlined by non-governmental stakeholders are still pending. There is a number of retaliation cases in courts and 12 retaliation cases were decided in favour of the whistleblowers. There are no reported cases of a breach of the confidentiality of a whistleblower that was not sanctioned. Although there is a higher number of citizen appeal reports resulting in criminal investigations (2880), the number of criminal cases in 2020 based on whistleblower reports is 508. In addition, the track record of whistleblower reports received cannot be determined with certainty, as only some authorities separate whistleblower reports from general reporting statistics. In addition, Ukraine does not collect statistics on the number of internal or external whistleblower reports. In 2020, the NACP provided 49 consultations, supported whistleblowers by participating in 12 judicial hearings and issued 5 orders to restore the rights of whistleblower in cases of retaliation. The NABU granted physical protection measures in three cases to whistleblowers participating in criminal proceedings. In addition, legal aid was provided to whistleblowers in 31 cases.

Assessment of compliance

Benchmark 4.4.1. – 4.5.5.

BENCHMARK	UKRAINE 2020	
	Total	Per 1 million of population
4.4.1. Track record of whistleblower reports received by public authorities through internal channels	N/A	N/A
4.4.2. Track record of whistleblower reports that were received by the central authority	N/A	N/A
4.4.3. Track record of consultations to whistleblowers provided by the central authority	49	1
4.4.4. Track record of criminal cases for corruption offences that were started as a result of whistleblower reports	508	11.5
4.4.5. Track record of at least one of the protection measures from those listed under 1.4-1.6	12	0.27

Note*:* Benchmark 4.5. is assessed based on the number of court cases for retaliation against whistleblowers.

Source*:* The population of Ukraine is 44 million according to the information provided by the World Bank: https://www.worldbank.org/en/country/ukraine/overview

Benchmark 4.4.6.

Protection is provided to all whistleblowers that require such protection and fulfilled preconditions for granting a protection

The monitoring team is unaware of any cases where whistleblowers were not provided protection. However in one case involving a judge who despite being provided certain protection measures, was still subject to retaliation in her workplace (refusal of annual evaluation, restricted communication with colleagues) and is also subject to criminal proceedings for false reporting by the Security Service of Ukraine (SBU).[40] This

[40] Pravda (26 April 2021), Expose and be punished: how the Kharkiv judge "pays".

case is still ongoing and as such, it is still too early to assess whether protection was effectively provided or not.

From the information provided by Ukraine 71 cases following retaliation against whistleblowers were in court, 34 are still ongoing and 25 have been concluded. In 2020, 12 cases were decided in favour of the whistleblowers and 11 entered into force. Of these 12 aforementioned decisions, 7 involved claims for reinstatement and compensation in the total amount of UAH 2,672,329 was awarded in 8 cases.

Benchmark 4.4.7.

All known cases of breaches of confidentiality of whistleblower identity were sanctioned

Breaches of confidentiality of whistleblowers is an administrative violation and is sanctioned under Article 172-8 Code of Administrative Offences. Stakeholders involved in the process of monitoring were unaware of any breaches that have not been sanctioned. At the same time, the monitoring team was not provided with a clarification on any follow up action carried out in relation to the case, in which according to media sources, confidentiality of a whistleblower has been breached. The NACP informed the monitoring team that they are aware of the case and have requested the identity of the whistleblower in order to begin the investigation.

5 Independence of Judiciary

Ukraine's judicial reform has been ongoing for many years. The constitutional reform of 2016 repealed judicial probation, introduced vetting of all judges, a new set-up of judicial governance bodies and new procedures for judicial selection and disciplinary proceedings. Yet, the lack of independent formation and operation of the judicial governance bodies has been a continued challenge since the last round of monitoring, and in the view of the main stakeholders remain as key obstacles to judicial independence and integrity in Ukraine. According to a GRECO report, the judiciary was considered weak, politicised and corrupt, and dominated by a strong prosecution service headed by a political appointee. The lack of trust in the judiciary remains the primary major obstacle to foreign investment in Ukraine.[41]

The latest judicial reform bills of July 2021, concerning High Council of Justice (HCJ) and High Qualification Commission of Judges of Ukraine (HQCJ), adopted after several versions of draft laws, Constitutional Court decisions to block the reform, and the Venice Commission Opinions, aims to address this issue by setting-up judicial governance bodies anew with a decisive role played by international experts in selecting members of these bodies. Considering the similar successful model of the selection of judges for the High Anti-Corruption Court of Ukraine with the jurisdiction over high-level corruption cases, these amendments are considered significant steps forward supported by both internal and external partners. However, the results have yet to be seen. Further obstacles can be foreseen, considering a recent development that the Plenum of the Supreme Court has challenged the part of the reform in the Constitutional Court of Ukraine.

The number of judges in Ukraine is more than 5 300. The HACC has 27 judges of the first instance, of which 12 serve as investigating judges, and 11 judges are in its Appeals Chamber. The vetting of all judges is suspended pending the implementation of the new reform and serious understaffing, with around 2000 vacant positions of judges, creates impediments for access to the courts.

Since 2016 there has been a large outflow of judges, more than 3000 judges left or were removed from their positions, which is very high in a relatively short time. Judicial remuneration appears sufficient but court staff receive nominal salaries and some discretionary bonuses. Overall, the funding of the judiciary does not seem to ensure its autonomy. Automatic distribution of cases is set in the law, but in practice transparent and objective case assignment excluding undue internal or external interference does not seem to have been ensured. Grounds for disciplinary liability of judges are not clearly defined and stakeholders do not see disciplinary proceedings against judges as impartial.

[41] European Court of Auditors (2021), Special Report, Reducing grand corruption in Ukraine: several EU initiatives, but still insufficient results, p.11.

Indicator 5.1. Judicial tenure is guaranteed in law and practice

Assessment of compliance

Benchmark 5.1.1. – 5.1.2.

5.1.1. Judges are appointed until the legal retirement age

5.1.2. If not, clear criteria and transparent procedures for confirming in office following the initial (probationary) appointment of judges are set in the law and used in practice

Outstanding in Ukraine: Clear criteria and transparent procedures for confirming in office following initial appointment are not used in practice

The Constitution and the Law on the Judiciary and the Status of Judges of Ukraine (LJSJ) guarantee judicial tenure. Probation of judges was abolished in 2016 and judges are appointed until the retirement age by law. However, judges appointed before the reform for the initial term of 5 years have to undergo qualification assessment (of competence, integrity and professional ethics). These assessments have not been finalized yet, and have been suspended since 2019 as a result of the termination of powers of the relevant bodies and the launch of a new reform due to various alleged breaches, especially in the context of the HQCJ and HCJ activity on selection of the Supreme Court Judges and conducting of qualification assessments, and related calls for reform.

As of October 2021, around 3400 judges still have to undergo their qualification assessment, among them around 400 judges, whose probationary term of office expired. These judges are paid but no longer administer justice. In total, there are about 2000 vacancies to be filled through the new process after the responsible bodies are formed and new regulations are in place (Art. 93.6[1], LJSJ). The monitoring team shares the view of the Venice Commission that these delays are problematic in view of the access to courts due to high number of vacancies.[42]

After the visit, the High Council of Judges (HCJ) noted that clear criteria and procedures for approval after the initial appointment of judges are defined by the Constitution of Ukraine (articles 127 and 128) and under section IV of the LJSJ.

Considering that there have been allegations of breaches in the process of re-appointment of judges as discussed below, and that not all judges have been assessed for lifetime appointments yet and new rules are still pending, the monitoring team is not satisfied to conclude that clear criteria and transparent procedures are in place for confirming appointments following the initial (probationary) appointment of judges and used in practice in the reporting period.

[42] Venice Commission (2019), Opinion No. 969/2019, para 20.

In the next reporting period, Ukraine has to demonstrate that clear criteria and transparent procedures for confirming in office of judges following initial (probationary) appointment are set in the law and used in practice.

Benchmark 5.1.3.

Judicial irremovability is ensured in practice and judges are not removed from office (including through ad hoc vetting or assessment) unless based on the law and objective grounds in exceptional cases

Outstanding in Ukraine: Ad hoc vetting, that started in 2016, was suspended 2019 and is still pending, cannot be considered as an exceptional measure based on objective grounds

The benchmark requires that judicial irremovability is ensured in practice. Ad hoc vetting or assessment of judges that may lead to their dismissal, should normally be excluded. Exceptionally, when justified by objective reasons, an ad hoc procedure for evaluation of judges would be considered in line with the benchmark, if its main aspects are regulated in primary law, there is a clear justification for such a measure, and objective grounds are used to evaluate judges.

Judicial irremovability is guaranteed by law (Art 126, Constitution, Art. 53, LJSJ), and judges may only be removed from office based on objective grounds and in exceptional cases. The qualification assessment of all judges was based on law (Art. 16-1(4) Transitional Provisions of the Constitutional of Ukraine; Art. 83 – 88 LJSJ), however, in practice this measure has not been limited in time and has been suspended with regulations being changed in the middle of it. These raise doubts as to the “extraordinary nature” of the measure. Neither can it be concluded that objective grounds had been used in practice to evaluate judges considering the concerns leading to the suspension of the procedure. Therefore, the monitoring team concludes that the benchmark has not been met.

The monitoring team also takes note of the previous monitoring report which found the vetting of all judges problematic in view of the large number of outflow of judges. During the on-site visit, stakeholders stated that only a few judges were removed from office as a result of the vetting, but a substantial number, around 25%, resigned, allegedly due to the unwillingness to undergo qualification assessments of their competences and integrity (including asset declarations) and that these judges chose resignation.

Furthermore, CSO representatives expressed concerns about the absolute majority of judges having successfully passed qualification assessments with less than 1% dismissed, despite negative conclusions on their integrity (see benchmark 5.2.1), which did not reach the intended outcome - to clean up the judiciary from judges lacking integrity. CSO representatives have also pointed out that judges have been pressured for “political reasons” which resulted in their resignations. However, the monitoring team has not been provided with concrete evidence on this matter.

A judge cannot be transferred to another court without his/her consent, other than in case of reorganisation, liquidation or termination of a court, or through disciplinary proceedings (Art. 53 LJSJ). While there are allegations of misusing disciplinary proceedings against judges (see benchmark 5.7.2.) the monitoring team has not been made aware of breaches related to the transfer of judges, specifically.

Several benchmarks of this PA have been affected by new reform bills of July 2021. Whereas related changes are explained in the assessment most of the time, these amendments did change the conclusions as the majority of benchmarks are concerned with the practice in the reporting period.

Indicator 5.2. Judicial appointment and promotion are based on merit, the involvement of political bodies is limited

Assessment of compliance

Benchmark 5.2.1.

An independent Judicial Council or a similar body plays a decisive role in the appointment and dismissal of judges, the discretion of political bodies (if involved) is limited by the decisions taken by the Judicial Council or a similar body

Outstanding in Ukraine: High Council of Justice and High Qualification Commission of Judges lack independence in practice

2016 constitutional reform removed the power of the Parliament to appoint judges and political bodies do not have a decisive role in judicial appointments and dismissals[43] which is the responsibility of the High Council of Justice (HCJ). Judges are selected by High Qualification Commission of Judges (HQCJ), and proposed to HCJ, which ultimately determines which candidates to propose to the President for appointment. HCJ proposals to the President are mandatory so the President's role in the appointment is ceremonial.

However, the benchmark also requires that bodies responsible for the appointment and dismissal of judges are independent from the executive and other authorities in their mandate and operation. Such independence should be ensured both in the law and in practice.

While the HCJ and HQCJ are independent under the law, the evidence collected by the monitoring team regarding their operation raises questions as to their independence and impartiality in practice. During the on-site visit, the monitoring team was alerted about series of alleged breaches in their formation,[44] and operations, for example in the selection of the Supreme Court judges and various disciplinary proceedings. The Venice Commission stressed that the issues concerning the integrity of the members of the HCJ are of an urgent nature and should be addressed as a matter of urgency.[45] Various internal and international calls for the reform of these bodies resulted in the launch of a new judicial reform, culminated with the new amendments to the LHCJ and LJSJ adopted in July 2021.

In addition, the monitoring team takes note of the criticism of the complex institutional set-up for the selection and appointment of judges, involving multiple bodies, by GRECO[46] and the Venice Commission[47] in view of the risks to the effectiveness and external influence.

---

[43] Dismissal regulated by Art. 55 – 56 LJSJ.
[44] Kharkiv Human Rights Protection Group (31 July 2019), Ukraine's Human Rights Ombudswoman caught in mounting judicial corruption scandal.
[45] Venice Commission (2020), CDL-AD(2020)022.
[46] GRECO (2017), Fourth Evaluation Round, Corruption prevention in respect of members of parliament, judges and prosecutors, Evaluation Report Ukraine.
[47] Venice Commission (2019), CDL-AD(2019)027.

Benchmark 5.2.2.

Judges are selected and promoted based on competitive procedures clearly set in the law and based on merit

Outstanding in Ukraine: Judicial selection and promotion in practice have not been based on merit

The primary law regulates competitive selection and promotion of judges, including principles, main stages, requirements to candidates, grounds for rejection of candidates, and criteria for decision-making. Various procedural steps, including eligibility assessment, special verification procedure and that qualification assessments are provided in detail and professional ethics and integrity, along with the candidate's competence, are among the selection criteria. These regulations were positively assessed by the Venice Commission.[48]

High Qualification Commission of Judges carries out selection assisted by the Public Integrity Council (PIC) established to assess professional ethics and integrity of candidates of the Supreme Court, Appellate Court and High Specialized court judges (except HACC judges) and for the qualification assessment of existing judges.[49]

PIC is comprised of 20 members selected at the conference of non-governmental organisations, including human rights activists, legal scientists, attorneys, journalists. Under the rules applicable during the period of review, however, PIC's conclusions were not mandatory for HQCJ which could overrule (with 11 votes out of all 16) negative opinion on integrity. Grounds for decision to overrule negative opinions are not set clearly in the law.

In addition, the HCJ can refuse to propose for appointment to the President, candidates recommended by HQCJ on vague grounds, such as: "existence of reasonable doubt on the compliance of the candidate with the criteria of integrity or professional ethics, existence of any other circumstances that may negatively affect the public trust in judiciary in relation to such an appointment;" (Art. 79.19, LJSJ). The monitoring team is not aware of any legislative changes, as a result of the recent judicial reform bills, in this regard. The refusal can be appealed in court.

While recognising significant improvements in the selection process compared to the previous procedure, civil society pointed to irregularities in practice, such as the lack of transparency, alleged misuse of psychological tests, and the lack of justification by the HQCJ for proposing candidates with negative assessments by the PIC. Such practice was significant, as 44 out of 193 of the appointed Supreme Court

[48] Venice Commission (2019), CDL-AD(2019)027; Venice Commission (2017), CDL-AD(2017)020.
[49] For detailed description of the selection procedure see Evaluation Report on Ukraine, adopted by GRECO at its 76th Plenary Meeting on 23 June 2017, pp. 38-40.

Judges were assessed negatively by PIC. Civil society also alleged an instance of forgery of HQCJ voting to overrule these negative opinions.[50]

These factors, in conjunction with the allegations of the lack of independence and impartiality of the judicial governance bodies involved in the process leads the monitoring team to conclude that the judicial selections and appointments have not been merit-based and impartial in practice.

By contrast, a special procedure of selection of the High Anti-Corruption Court judges, with the decisive role of the Public Council of International Experts (PCIE) (see box 5.1) has been seen as success and recommended for common court judges too by the Venice Commission[51] and internal stakeholders alike. Using same standard for all judges would be in line with the benchmark.

Benchmark 5.2.3.

Judicial vacancies, with the terms and conditions, and results of all stages of the judicial selection and promotion are announced online with the publication of relevant decisions and their justification

Outstanding in Ukraine: Both HCJ and HQCJ decisions seem to lack justification

Information on vacancies and decisions on selections and promotions are to be published online under the law (LHCJ Art. 34.6.). Both HCJ and HQCJ publish their decisions online, including in open data format. As regards justifications of decisions, according to civil society interviewed during the on-site visit, HQCJ failed to justify its decision to disregard the information about alleged unethical actions and evidence of illicit enrichment of some candidates in the process of selection of the Supreme Court judges and qualification assessments of incumbent judges.[52]

[50] Dejure Foundation (12 June 2019), The HQCJ falsifies the voting process to avoid dismissing dishonorable judges.
[51] Venice Commission (2020), CDL-AD(2020)022.
[52] Dejure Foundation (2018), Report on the Establishment of the new supreme court: Key Lessons; Center for Political and Legal Reforms/Dejure Foundation/Automaidan (2019), Report on qualification assessment of judges.

Indicator 5.3. Court presidents do not interfere with judicial independence

Assessment of compliance

Benchmark 5.3.1.

Court presidents are elected/appointed by the judges of the respective court or by the Judicial Council or similar judicial body based on merit and transparently

To be compliant with this benchmark the election of court presidents should be merit-based and competitive: vacancies should be announced and all judges with the necessary level of competence should be able to apply. The procedure of election/selection should also be transparent, i.e. judges should know that there is a vacancy, and stages of selection should be publicized (at least for judges, if not for the general public).

In Ukraine, court presidents are selected by the judges of the respective courts from among its judges through a secret ballot by simple majority (Art. 20 LJSJ). However, according to the Government's responses to the questionnaire, the selection criteria are not clear and the procedure is not merit-based and transparent, and there has been at least one case in which a court president was selected by judges despite a criminal investigation open against the judge in question.[53]

In addition, there appear to be irregularities of non-compliance with the tenure of a court president which is 3 years (with the exception for the Supreme Court President, his/her tenure on the administrative position is 4 years). By law, the same judge cannot hold the same administrative position at the court for more than 2 successive terms. But in practice, the evidence collected during the monitoring suggests, that court presidents stay in their positions longer, by misinterpreting the term of office or by holding the position of an acting president indefinitely. There is no legal remedy against this practice and there appear to be a number of examples of court presidents being in the positions for more than 2 successive terms.[54]

Benchmark 5.3.2.

Court presidents do not influence the judicial remuneration or other benefits received by judges

Court presidents do not have powers related to the remuneration and benefits of judges. Their functions are limited to administrative and organisational matters (LJSJ Art. 24, 29, 34, and 39). The level of remuneration and benefits of judges are clearly defined by law (Art. 135 LJSJ).

[53] Судово-Юридична Газета (21 January 2021), Chairman of the District Administrative Court of Kiev elected.
[54] ЧЕСНО.Фільтруй суд! (27 October 2020), "Eternal" chairmen of courts: "businessmen" or "corrupt"?

Indicator 5.4. Judicial budget and remuneration guarantee financial autonomy of the judiciary and judges

Background

According to the Constitution of Ukraine (Art.130), the state provides funding and appropriate conditions for the functioning of courts, and budget allocations for the judiciary take into account the proposals of the High Council of Justice. The same article provides that judicial remuneration should be set in the law on judiciary.

Assessment of compliance

Benchmark 5.4.1.

The funding received by the judiciary is sufficient to ensure its autonomy

The High Council of Justice considers the budget insufficient and has requested an increase several times but has not been granted such an increase. In September 2020, the Supreme Court Plenary authorized the Supreme Court President to raise the issue of insufficient financing of the judiciary as a threat to judicial independence. In 2021, only 38.4% of requested allocations were provided for the functioning of the first instance and appellate courts (in 2020 – 64.4%; in 2019 – 72.4%; in 2018 – 77.9%).

The Government responses to the questionnaire stated that the Ministry of Finance publicly pointed to the ineffectiveness of the allocation of funds by State Judicial Administration. An audit has been carried out and violations in the amount over 2.8 billion UAH were identified in 2019-2020 by the State Audit Office. [55]

Civil society responses to the monitoring questionnaire provide that the funding of the judicial system is high, but the budget is poorly managed and misused by the State Judicial Administration.[56] At the same time, several stakeholders interviewed during the visit echoed these concerns on the lack of funding of the judiciary.

The HCJ noted after the visit that the low level of funding of the judiciary, especially in respect of local and appellate courts during 2020-2021, resulting in low salaries for the staff of these courts, and the lack of funds to purchase office supplies or to pay for utilities bills had negatively impacted the execution of court decisions on judicial remuneration during this period. In addition, the HCJ received 106 appeals from courts regarding insufficient funding of their activities in 2020. The HCJ further noted that since the entering into force on 1 January 2021 of amendments to the Law "On making amendments to the Budget Code of Ukraine" the allocation of the judiciary's budget is agreed upon between the HCJ and the State Judicial Administration of Ukraine (SJA).

---

[55] Ministry of Finance of Ukraine (2021), Budget-2022: Ministry of Finance will allocate about 21 billion hryvnias to finance the judiciary next year.
[56] Dejure Foundation, The HCJ sends judges to honorary resignation instead of dismissal for violations.

According to the Council of Europe European Commission for the efficiency of justice (CEPEJ) report, “Ukraine, in particular, shows a huge increase in the budget dedicated to the judicial system, both in Euros and in local currency, following a reform providing for salary increases and other structural investments in buildings and information and communication technology (ICT)".[57] However, in terms of court budgets per inhabitant, although it is higher than other Eastern Partnership Countries, Ukraine is below the CEPEJ median and is in 6th to last place.[58]

While the provided statistics show a significant increase of funding of courts over the course of 7 years (in 2021 quadrupled compared to 2015) there appear to be systemic impediments regarding the sufficiency of funding to ensure the autonomy of the judiciary either due to insufficiency or partly also possible inefficient use of the funding. Considering contradictory views and information about the insufficiency of budget clearly communicated to the monitoring team by the authorities and some stakeholders interviewed during the on-site visit, the monitoring team cannot conclude that the funding received by judiciary is sufficient to ensure its autonomy.

Benchmark 5.4.2.

The level of judicial remuneration is fixed in the law, is sufficient to ensure judicial independence and reduce the risk of corruption and excludes any discretionary payments

Judicial remuneration is fixed in the law and it excludes discretionary payments (Art. 135, LJSJ). Remuneration of judge consists of a base salary and additional payments for seniority, for holding an administrative position in court, an academic degree, and work involving state secrets. Minimal Salary of a judge of a first instance court is UAH 63 060 (EUR 1 865), and of a Supreme Court judge is UAH 157 650 (EUR 4 664). As of January 2021, the average salary in Ukraine is UAH 12 337 (EUR 365) and in Kyiv, the highest in Ukraine, is UAH 17 553 (EUR 519). According to the Government and stakeholders considering the average salary in Ukraine and the salary of prosecutors, judicial remuneration is proportionate, as well as sufficient to ensure judicial independence. The HCJ also noted after the visit that the subsistence level, which is used to calculate salaries of civil servants, is fixed at 2481 UAH (81 EUR) in the registered draft Law of Ukraine "On the State Budget of Ukraine for 2022". However, the subsistence level used to determine the basic salary of a judge is 2102 UAH (68 EUR).

Benchmark 5.4.3.

The level of remuneration of the court staff and judicial assistants is sufficient to reduce the risk of corruption

The level of remuneration of the court staff and judicial assistants appears insufficient. As of January 2021, the salary of assistants to judges varied from UAH 10 714 to UAH 16 934 (from EUR 317 to EUR 500), depending on the level of the court instance, which is very low. According to the stakeholders interviewed during the visit, discretionary payments and benefits are often higher than basic salary and are inconsistent

[57] Council of Europe (2020), European judicial systems CEPEJ Evaluation Report, p. 20.
[58] CEPEJ - Budget v2020.1.

from one court to another. According to their replies, remuneration of staff is not transparent, and discretionary payments are subject to favouritism, judges and court staff that have connections with the State Judicial Administration that administers the funds can lobby and get better remuneration.

Indicator 5.5. Status, composition, mandate and operation of the Judicial Council guarantee judicial independence and integrity

Background

This Indicator is applied to both the judicial governance bodies of Ukraine: the High Council of Justice (HCJ), that a constitutional judicial governance body is responsible for judicial appointment, promotion, transfer, evaluation and discipline (Art. 126, Constitution of Ukraine) and the High Qualification Commission of Judges (HQCJ), another judicial governance body responsible for selection and qualification assessment of judges to recommend the candidates to the HCJ.

Due to the alleged lack of impartiality and integrity of these bodies, the international community, including the Venice Commission, the EU and the IMF, and civil society alike called upon Ukraine to reform these bodies to ensure a transparent and objective process of qualification assessments and appointments of judges.

The HQCJ was dissolved in November 2019 in response to these calls. New judicial reform bills adopted in July 2021 aimed at reforming both of these bodies. Under the new provisions, international experts are given a decisive role in vetting current members of the HCJ and selecting new candidates, as well as the members of the HQCJ through a transparent and competitive selection procedure. No changes are foreseen in the composition of these bodies.

During the visit, stakeholders referred to the draft amendments as a last attempt to comprehensively reform Ukraine's judicial governance bodies, build public trust and confidence in the HCJ and the judiciary overall. These amendments indeed appear to be a significant step forward towards ensuring independent formation of the judicial governance bodies of Ukraine.

Assessment of compliance

Benchmark 5.5.1.

The Judicial Council or other similar bodies are set up and function based on the Constitution and law that define their powers and mode of operation

Outstanding in Ukraine: HCJ is partially operational and HQCJ is not yet set up

The Constitution, the law on High Council of Justice and Law on Judiciary and Status of Judges define the powers and mode of operation of HCJ and HQCJ, including the procedures for conducting meetings, decision-making, transparency of their work, publication of decisions, and safeguards for fair proceedings. In the reporting period however, the new composition of the HQCJ is not yet set up and the HCJ is only partially operational.

As a result of the amendments of July 2021, these bodies will be formed anew. The current members of the HCJ will be vetted and 4 existing vacancies will be filled through a competitive selection process.

Similarly, the HQCJ, suspended for about 2 years now, will be recreated based on a competitive selection process.

For the HCJ, the Ethics Council will be established to assist constitutional bodies (Parliament, President, Congress of Judge, Congress of Attorneys, Conference of Prosecutors and Congress of Academia) to select new members and vet current members of the HCJ based on integrity and professional competence criteria. [59] The first Ethics Council will be composed of 6 members with 3 incumbent or retired judges nominated by the Council of Judges of Ukraine and 3 international experts nominated by international organisations, which will have a mandate for 6 years. If the Ethics Council finds that a HCJ member does not comply with integrity requirements, it recommends the removal from office of that member to the appointing authority. The Council will also propose to appointing bodies a list of new candidates for HCJ membership who comply with the integrity and professional competence criteria.

The Ethics Council's decision is based on a "reasonable doubt" standard and is adopted if the majority of members have voted for it, including at least two international experts. In case of a tie vote, the votes of international experts prevail. The Ethics Council members are selected though a transparent process and they are subject to conflict of interest rules.

As to the HQCJ, its members will be competitively selected by a Competition Commission, a subsidiary body of the HCJ (Art. 95[1]). The first Competition Commission will be composed of 6 members, 3 of them judges or retired judges nominated by the Council of Judges of Ukraine and 3 experts nominated by international organizations. [60] The Competition Commission will propose a list of candidates for HQCJ membership who comply with the integrity and professional competence criteria to the HCJ. The HCJ will subsequently conduct public interviews with the recommended candidates and appoint successful candidates. A decision of the Selection Commission is adopted if at least four members of the Competition Commission have voted for it, including two members who are international experts. In case of tie vote, the votes of three members that include two international experts prevail. The Competition Commission members are also subject to conflict of interest rules.

It is not clear to the monitoring team however whether these bodies will be formed in parallel or whether the HCJ will be formed first. Stakeholders alluded to potential risks related to an "unreformed" HCJ forming a new HQCJ. This could indeed be an important issue. Overall, the monitoring team concludes that these legal changes are significant improvements in the formation of the judicial governance bodies and related practice is yet to be seen.

[59] Law on "Amending Selected Laws of Ukraine Regarding the Procedure for Election (Appointment) of Members of the High Council of Justice and the Operations of Disciplinary Inspector of the High Council of Justice", No 5068, adopted on 14 July, 2021.
[60] Law on "Amending Law of Ukraine on "Judiciary and Status of Judges" and Selected Laws of Ukraine Regarding Resumptions of Operations of the High Qualifications Commission of Judges of Ukraine", (3711-D).

Benchmark 5.5.2.

The composition of the Judicial Council or other similar bodies includes not less than half of judges elected by their peers representing all levels of the judicial system

Outstanding in Ukraine: HCJ is partially operational and HQCJ is not yet set up

HCJ is composed of 21 members, the majority of which are judges, elected by the Congress of Judges representing all levels of the judicial system. The President of the Supreme Court is an ex-officio member.

During the visit, the representatives of civil society organisations pointed out allegations of the lack of proper and free conduct of previous elections related to improper instructions to the delegates from the then deputy chairman of the Supreme Court to vote for pre-agreed candidates. Furthermore, the assets of two of the elected HCJ members seem to have been questioned (source) without a follow up. Representatives of the relevant bodies interviewed during the on-site did not confirm any irregularities, but also did not update the monitoring team on how these serious allegations have been or were being addressed.

With the amendments adopted in July 2021, the vetting of the current members of the HCJ under the new provisions will concern the acting judge members of the HCJ as well. The Congress of Judges will remain responsible for electing the judge members, based on the nominations of the Ethics Council, as described above.

HQCJ has 16 members, appointed by the High Council of Justice based on a competitive selection. Half of the members are judges or retired judges however, their peers do not elect them.

Benchmark 5.5.3.

Members representing the judiciary in the Judicial Council or other similar bodies are elected through a general vote of all judges

Under the law, members representing judiciary are to be elected by the Congress of Judges through a secret ballot. The Congress of Judges is the supreme body of judicial self-governance. However, HQCJ members are not elected through a general vote of all judges.

Benchmark 5.5.4.

The composition of the Judicial Council or other similar bodies includes a substantial number of non-judicial members who represent the civil society or other stakeholders that have public trust (e.g. academia, law professors, human rights defenders, NGO representatives), have an appropriate legal qualification and are selected through a transparent procedure based on merit

Outstanding in Ukraine: Non-judicial members of neither the HCJ nor the HQCJ have been selected through a transparent procedure based on merit.

The composition of the HCJ includes substantial number (10 out of 21) of non-judicial members appointed by the President, the Parliament, the Congress of Attorneys, the Conference of Prosecutors and the Congress of Academia, two each. The HCJ is operational with the minimum of 15 members present, the majority of which should be judges. Decisions are adopted with a simple majority. Appointment of a judge should be supported by at least 14 members, which will need to include at least 3 non-judicial members present and voting. This allows non-judicial members to meaningfully influence the decisions of the HCJ.

The HQCJ has 16 members appointed by the High Council of Justice based on the results of a competition conducted by a Selection Commission. Composition of the HQCJ is not clearly defined by law, it is only stated that half of the composition are judges and it is not clear which non-judge members represent civil society or other stakeholders that enjoy public trust (e.g. academia, law professors, human rights defenders, NGO representatives) and have appropriate legal qualification. The HQCJ is operational with at least 11 members, of which 6 are judges or retired judges, for HQCJ too, a meaningful representation of non-judges members seems to have been ensured.

With the new amendments, the responsibility to appoint non-judicial members of both bodies will be vested in the same institutions that had such responsibility under the previous regulations, but the candidates will be proposed by the Ethics Commission and the Selection Commission and be selected through a transparent procedure based on merit.

Benchmark 5.5.5.

The Judicial Council or other similar bodies are responsible for all questions of the judicial career (including selection, promotion, transfer, evaluation) and discipline

The HCJ is responsible for all questions of judicial career, including selection, promotion transfer evaluation and discipline except for selection and qualification assessment that fall within the mandate of the HQCJ. The latter also provides recommendations on the transfer of judges except when it is done as a result of a disciplinary procedure.

Benchmark 5.5.6.

There is a wide perception among the main stakeholders that the Judicial Council or other similar bodies operate independently and impartially without political or other undue interference in their work

There is a wide perception among the main stakeholders that, during the reporting period, the HCJ and HQCJ were not independent and impartial without political or other undue interference in their work. The operations of these bodies have raised significant concerns and resulted in the adoption of the new judicial reform bills discussed above. The monitoring team was told that potentially old networks of judges continued to possess much of the power and that the general perception is that without an overhaul of the composition of the HCJ and HQCJ, there will be no progress in filling the vacant judicial posts with judges of high integrity and competence, based on merit.

There is an expectation that the new amendments that gave the decisive role in the selection of candidates of the judicial governance bodies to international experts will allow for the cleaning up of the current composition of the HCJ and create a new HQCJ with members of high integrity and robust professional reputation.

The High Council of Justice emphasizes that public authorities and their officials should refrain from communication and political campaigns, statements and actions that could affect the independence of the judiciary and undermine the authority of the judiciary as a whole. When commenting on judges' decisions, the executive and the legislative powers should avoid criticism that could undermine the independence of the judiciary or public confidence in it. They should also avoid actions that could call into question their willingness to comply with judges' decisions, except when they intend to appeal.

Benchmark 5.5.7.

Proceedings and decisions of the Judicial Council or other similar bodies, including their justification, are transparent for the public scrutiny

Previously, the HCJ meetings were broadcasted online by default, however, now this is possible only based on a motion and a decision of the HCJ, if all the parties of the meeting agree. Media accredited by the HCJ may participate in the meetings.[61] The law provides for publication of the decisions of the HCJ in full seven days after their adoption.

During the visit, NGOs confirmed that decisions are published but added that they are difficult to analyse because of the format and that the HCJ refuses to publish the documents in the open data format. Furthermore, pandemic restrictions are used to prevent civil society and journalists to participate in the proceedings. After the on-site visit, the monitoring team was informed of instances in which the decisions

[61] Dejure Foundation, The HCJ closes information about its activities.

on disciplinary proceedings had not been published or provided through access to information requests, even after Supreme Court rulings against the HCJ on this matter.[62] Replies of the HCJ representative during the visit indicated that some of the limitations regarding the publications are due to software issues, which were out of their hands, and not due to the existing legal framework that enables a high degree of transparency of proceedings and decisions.

Benchmark 5.5.8.

Members of the Judicial Council or other similar bodies comply with the conflict of interest rules in their work

HCJ members are obliged to refuse to participate in decision-making in case of conflict of interest or other circumstances that cast doubt on his/her impartiality (Art. 20.3.5, LHCJ). Violation of these rules entail disciplinary liability. The statistics of practical application of this rule has not been provided to the monitoring team and civil society organizations identified a number of cases of alleged conflict of interest in the process of appointment of the Supreme Court Judges with allegations sent to the Police and the NACP. Based on CSO allegations, the NACP carried out investigations of alleged conflict of interest of members of the HCJ, but later assessed these investigations as interference in the exercise of its functions.[63]

Indicator 5.6. Distribution of cases among judges is transparent and objective; judicial decisions are open to the public

Background

Ukraine introduced the automated case distribution system in the judiciary in 2011 (LJSJ Art. 15). The law provides that the allocation of cases should be automatic and consider the workload of a judge, specialization, prohibitions to participate in the review of previously adjudicated cases, location of the court, absence due to vacations, business trips or temporary reassignment, temporary incapacity to work, and other obstacles stipulated by law that make impossible the adjudication of cases by a judge. The conference of judges of a particular court may establish narrow specialization of judges in line with the classification adopted by the State Judicial Administration. Criminal liability is foreseen for illegal interference into the functioning of the automated allocation of cases. There is a detailed procedure - the Regulation on automated system of workflow of courts adopted by the Council of Judges.

In addition, a new United Judicial Information and Telecommunication system comprising several modules that includes distribution of cases was designed and launched in a pilot mode. According to the authorities,

[62] Dejure Foundation (6 April 2021), The GRP is massively violating the right of access to information despite the Supreme Court's decision; Dejure Foundation (April 2021), Constant problems with bringing judges to disciplinary responsibility.

[63] High Anti-Corruption Court (28 January 2021), HACC judges approved a statement guaranteeing the independence of the Supreme Anti-Corruption Court; Dejure Foundation, The GRP is putting pressure on judges of the Supreme Anti-Corruption Court; TI Ukraine (14 January 2021), The High Council Of Justice Is Becoming An Obvious Tool In The Hands Of Corrupt Officials.

introduction of this system will be an important next step for transparent and objective distribution of cases among judges.

Assessment of compliance

Benchmark 5.6.1.

Distribution of cases among judges in all courts is automated and ensures transparent and objective case assignment excluding any undue internal or external interference

Outstanding in Ukraine: Automatic distribution of cases is not ensured in practice and case assignments do not exclude undue interference.

Automatic distribution of cases is in place and operational (Art. 15, LJSJ). A foreseen exception to the automatic distribution is if the system does not function for more than 5 days and cases have to be allocated manually. At the same time, the system does not appear to be transparent and properly functioning in practice. Stakeholders pointed to various ways, in which it can manipulated, for example by using sick leave or a vacation of a judge to assign cases to a specific judge, as well as specialization of judges, and vague criteria for the allocation of cases. There are several allegations of manipulation of the system by the District Administrative Court of Kyiv.

A journalistic investigation that describes these various ways of manipulation of the system, revealed alleged circumvention of the automatic distribution of cases in high-profile cases, without a proper follow up.[64] But the monitoring team was advised that this is an ongoing case. According to judicial statistics for 2019-2020, one person was found guilty of illegal interference in the functioning of the automated system of workflow of the court and was fined. In 2020, 30 criminal proceedings were pending, 4 cases were submitted to the court. While the monitoring team welcomes the follow up on alleged irregularities, it concludes that the case assignments do not exclude undue interference in Ukraine. It calls on the authorities to address the issue.

Benchmark 5.6.2.

All judicial decisions delivered in open proceedings are published online

The law provides for publication of all judicial decisions except for those adopted in a closed hearing, in an open online state register, the next day after the signature at https://reyestr.court.gov.ua/. Decisions on investigative measures are published after their execution. Personal information is withheld from publication. Some decisions may be classified after the publication at the request of a detective, investigator or prosecutor to the administrator of the Register of Judgments in case the disclosure of information from the decision can harm the investigation or in order to protect life, health and property of persons involved in criminal proceedings. The NACP reported on non-publication of several judicial

[64] Radio Free Europe (11 July 2019), "Judge's roulette": how the District Administrative Court bypasses the auto-distribution of cases between judges.

decisions for unknown reasons. According to civil society, all court decisions delivered in open proceedings are published. The monitoring team notes that given the information received during this review, non-publication of certain decisions need to be addressed to ensure that all decisions are published.

Indicator 5.7. Judges are held accountable through impartial decision-making procedures that protect against arbitrariness

Background

Disciplinary proceedings are carried out by the Disciplinary Chambers of the HCJ. The new judicial reform of July 2021, introduced a Disciplinary Inspectors Service that will operate in the Secretariat of the High Council of Justice as a standalone structural unit set up to support the HCJ's powers of administering disciplinary proceedings. The decisions of Disciplinary Chambers can be appealed to the HCJ and subsequently these decisions can be appealed to the Supreme Court.

Assessment of compliance

Benchmark 5.7.1.

Grounds and procedures for the disciplinary liability and dismissal of judges are clearly stipulated in the law

Outstanding in Ukraine: Grounds of disciplinary liability are not clearly defined

Grounds and procedures for disciplinary liability and dismissal of judges are provided in law (Art. 106-111, LJSJ and Chapter 4, LHCJ). While the procedure and stages of disciplinary proceedings are clearly spelled out, grounds are not narrowly and clearly defined. For example, one of the grounds for disciplinary liability is "commission by a judge of conduct that defames the title of judge or undermines the authority of justice, in particular in matters of morality, honesty, integrity, conformity of the judge's lifestyle to his status, compliance with other judicial ethics and standards of conduct that ensure public confidence in the court." (Art. 106.3, LJSJ).

"Clear grounds of disciplinary liability" mean that the law expressly states all the actions or inaction that can result in the liability, that grounds are formulated narrowly and unambiguously (avoiding such general formulations as "breach of oath", "unethical behaviour", "improper performance of duties"), that there is no overlap or contradiction among different grounds.

GRECO criticised grounds for disciplinary liability of judges for the lack of clarity and precision and recommended defining disciplinary offences more precisely, including by replacing the reference to "norms of judicial ethics and standards of conduct which ensure public trust in court" with clear and specific offences had not been implemented according to the Compliance Report, as of December, 2019 (Link).

Benchmark 5.7.2.

Application of disciplinary and dismissal procedures to judges is perceived by main stakeholders to be impartial

Application of disciplinary and dismissal procedures to judges is not perceived by main stakeholders as impartial, but rather biased and used as a tool by HCJ to pressure judges with high integrity. According to CSOs interviewed during the visit, the HCJ is selective in imposing sanctions applying "double standards" in disciplinary proceedings.[65] During the on-site visit, stakeholders further described these situations providing various examples as evidence for their statements. The monitoring team did not hear any rebuttal of these allegations, as according to the HCJ representatives interviewed during the visit, the HCJ cannot comment on relevant pending cases.

According to the CSO responses to the questionnaire, the HCJ has systematically failed to take action against dishonest judges and allowed them to avoid disciplinary responsibility, has put pressure on independent judges and has promoted judges with a questionable reputations (link). Disciplinary proceedings have been used as a tool for the HCJ to intimidate independent judges, including HACC judges, and avoid the liability of dishonest judges as described under PA 12.

After the visit, the HCJ noted that the perception of disciplinary proceedings by other stakeholders as impartial could be ensured by the harmonization of disciplinary practices of the HCJ in making decisions on bringing judges to disciplinary liability. In addition, the HCJ noted that a working group had been created within the HCJ on 1 June 2020 aimed at systematizing and generalizing the practice of the HCJ on disciplinary proceedings against judges including on the grounds that a judge's conduct disgraces a status of judicial tenure or undermines the authority of justice, in particular, on the issues of moral, integrity, incorruptibility congruence of the lifestyle of a judge with his/her status, compliance with other norms of judicial ethics and standards of conduct which ensure public trust in the courts, manifestation of disrespect to other judges, lawyers, experts, witnesses or other litigants (article 106 LJSJ).

Benchmark 5.7.3.

Court presidents, including Supreme Court chief judge, do not have a role in the disciplinary proceedings against judges

Outstanding in Ukraine: Chief Justice takes part in the consideration of the appeal of the decisions on disciplinary responsibility.

Disciplinary Chambers of the HCJ carry out disciplinary proceedings. Court Presidents are not members of these Chambers and do not have powers to initiate a disciplinary case or participate in decision-making. However, the Chief Justice as an ex officio member of the HCJ participates in the HCJ plenary meetings where the decisions of the disciplinary chambers are appealed.

[65] Dejure Foundation, The HCJ applies double standards when considering disciplinary cases.

According to civil society interviewed during the visit, in practice, there are influential court presidents that interfere in the HCJ's operations and impact decisions. In particular, there are also several cases investigated by the NABU regarding allegations of serious improprieties by prominent members of the courts as described under PA 12.

Benchmark 5.7.4.

There are procedural guarantees of the due process for a judge in the disciplinary proceedings, including the right to be heard and employ a defence, the right of judicial appeal

Procedural and due process guarantees in disciplinary proceedings are in place and include the right to be heard and employ a defence and the right of judicial appeal (Art. 47, Chapter 4, LHCJ). The new judicial reform bills of July 2021 introduced an amendment providing for the postponement of proceedings in the absence of a judge if this absence is justified (Art. 47.3 LHCJ), which is in line with the Venice Commission recommendation.

The judge to the High Council of Justice may challenge disciplinary decisions. However, the complainant can only do so "if the disciplinary chamber grants him/her permission for that", which appears restrictive. The monitoring team is unaware of any breaches of these guarantees in practice.

Benchmark 5.7.5.

The final decisions regarding judicial discipline are published online including their justification

The benchmark requires the publication of final decisions regarding judicial discipline, including their justification. While decisions of the Disciplinary Chambers, as well as their appeals to the HCJ are published online in full, according to the stakeholders interviewed during the visit, these decisions lack justification. The HCJ also publishes decisions to refuse opening a disciplinary case, indicating names of the applicants and reasons for refusal, but justification is not provided.

Benchmark 5.7.6.

There is no criminal or administrative punishment for judicial decisions (including for wrong decision or miscarriage of justice), or such sanctions are not used in practice to exert undue influence on judges

There is no criminal or administrative liability for judicial decisions. The Constitutional Court of Ukraine declared the article of the Criminal Code "delivery of a knowingly unfair judgment" (former Art 375 of the CC) unconstitutional, this article is abolished as of March 2021.

Benchmark 5.7.7.

Proportionate and dissuasive disciplinary sanctions are routinely applied to judges

For this benchmark to be met, sanctions should be proportionate, should take into account and correspond to the nature and gravity of the offence. For this, different types of disciplinary sanctions should be available and applied for different disciplinary offences. Dismissal of a judge should be possible only in exceptionally serious cases. Sanctions should also be dissuasive, that is sufficiently strong to discourage offences. To be dissuasive sanctions have to effective, that is enforceable and properly addressing the offence in question. Routinely applied means, used systematically as a usual practice, where failure to apply or use them is an exception, while their application is the norm.

The judicial reform of 2016 introduced an appropriate scale of sanctions that allows for ensuring the principle of proportionality. Ukraine provided statistics of disciplinary sanctions against judges (see below) that show application of the various ranges of available sanctions for judges. Along with statistics, however, the monitoring has to consider other sources of information, including opinions of stakeholders, and existing studies and reports. In this respect, considering the material provided,[66] together with the prevalent perception of main stakeholders of the lack of routine application of such sanctions, the monitoring team is not satisfied that the application of dissuasive and proportionate sanctions is a norm in Ukraine.

According to the HCJ, its Disciplinary Chambers in 2020 adopted 129 decisions on disciplinary liability for 141 judges with the following sanctions:

- warning – 72 judges;
- reprimand – 28 judges;
- severe reprimand – 22 judges;
- temporary suspension – 5 judges;
- dismissal – 14 judges.

Benchmark 5.7.8.

All public allegations of corruption of judges were thoroughly investigated with justified decisions taken and explained to the public

This benchmark looks into public allegations of specifically corruption offences. Cases that are ongoing during the monitoring are not considered. The monitoring team is unaware of any public allegations of corruption offences allegedly committed by judges that have not been thoroughly investigated with justified decisions not made or not explained to the public. At the same time, the monitoring team was provided with information of alleged misconduct committed by judges. But it is unclear if these alleged violations

[66] Council of Europe (2018), Analytical Report on the implementation of measures in accordance with decisions of the ECHR in the cases of Oleksandr Volkov v. Ukraine and Salov v. Ukraine, pp. 19-20; Center of Policy and Legal Reform (2018), Report on the Disciplinary practice High Council of Justice regarding judges, pp. 18-21; Dejure Foundation, The HCJ applies double standards when considering disciplinary cases.

have had elements of a criminal offence. In the latter case the monitoring team would need to assess Ukraine's response and follow up on these allegations.

Box 5.1. High Anti-Corruption Court of Ukraine

Established in 2018 to address the lack of enforcement by general courts of corruption cases investigated by NABU and prosecuted by SAPO, the High Anti-Corruption Court of Ukraine (HACC) has jurisdiction over high level corruption cases mirroring NABU's and SAPO's jurisdiction. The HACC has been widely seen as a successful model and an example of high professionalism and independence both internally and internationally[67]. Stakeholders interviewed during the visit were unanimous in assessing the operations of HACC as highly transparent, with a high standard of integrity and delivering high quality decisions.

Judges of the HACC have been selected through an independent and transparent process, based on objective criteria clearly defined by law, with the decisive role played by international experts in the selection process. The Public Council of International Experts (PCIE) members were selected with the involvement of international organisations, including the OECD. The PCIE scrutinized all 113 candidates and vetoed 42 of them. Decisions on integrity of the candidates were taken under the "reasonable doubt" standard, which according to a former international member of PCIE interviewed during the visit was the key to the success of the whole process. The selection included anonymous written tests and a case study, testing of personal, moral and psychological qualities and general abilities. Under the Law "On the High Anti-Corruption Court", the moral, ethical and professional requirements should ensure the selection of competent judges with impeccable reputations. In April 2019, the President of Ukraine signed a decree to appoint selected judges to the new anti-corruption court. The selection of these judges has been seen as competitive, unbiased, and fair and completed at very high standards.

The HACC started its work in September 2019. As of July 2021, HACC received about 322 criminal proceedings and had convicted 36 persons.

The number of judges in the HACC has been set at 39, of which 12 are judges of the Appeals Chamber of the HACC. The HACC has an autonomous budget (UAH 509,9 million (approximately EUR 15,39 million))

The international community played a crucial role in its launch and still continues to support its operations. According to CSOs, unfortunately, public perception of the HACC is not as good as it should be and as its practice shows, which can be attributed to the generally low trust of courts and lack of awareness of the HACC as well as the low number adjudications so far, as the court was established only recently.

Regrettably, various forces have been interfering in the successful operations of the HACC trying to undermine its work, including through CCU decisions that resulted in the termination of criminal cases,

[67] Venice Commission (2020), CDL-AD(2020)022

as well as by disciplinary proceedings of the HCJ allegedly used to intimidate HACC judges. According to the NABU, as well as civil society, the HCJ systematically pressures HACC judges[68]. The NACP is also aware of the cases when HCJ members demanded HACC judges to disclose materials of ongoing cases. There is a constitutional motion on possible unconstitutionality of the Law on High Anti-Corruption Court currently pending before the Constitutional Court of Ukraine.

The monitoring team would like to commend Ukraine for this achievement and urge the authorities to protect the independence of the Court.

[68] NABU (27 November 2020), On the systemic illegal influence of the GRP on the pre-trial investigation in cases concerning the Minister of Ecology; ANTAC, The High Council of Justice has accused WACS judges of violations without even considering the case against them.

6 Independence of the Prosecution Service

The appointment and dismissal of the Prosecutor General is not based on objective and transparent grounds. Prosecutorial governance bodies do not play a role in this process. There is a wide perception among the main stakeholders that the appointment and dismissal of the Prosecutor General in Ukraine are decisions that are entirely politically motivated unbounded by established criteria or even legal qualifications.

The Prosecution Service of Ukraine has undergone several rounds of reforms. In the 2015-2016 period, reforms included procedures for merit-based appointment of prosecutors but in practice the process has not been considered competitive and transparent.[69] In September 2019, following the launch of a new two-year comprehensive reform of the Prosecution Service of Ukraine, the procedure for selection, appointment and promotion was suspended, and replaced by a temporary one aimed at speedy vetting of all practicing prosecutors for their knowledge of the law, job requirements and integrity and filling in vacancies through a merit-based selection process involving international experts. This was aimed at downsizing and perceived to be directed at removing incompetent and unethical prosecutors from the Prosecution Service and recruiting highly professional prosecutors with integrity. But the process has stalled and the temporary period has expired and the relevant bodies and processes need to be restarted.

At the time of the visit, the Prosecutorial Council was not operational due to the lack of a quorum, as some of its members have been appointed to other administrative positions but its secretariat was in place. The Prosecutorial Council or another similar body is not responsible for the performance evaluations of prosecutors in Ukraine. The assignment and re-assignment of cases among prosecutors is not based on clear and transparent rules that are set in legislation and ensure impartiality and autonomy from external and internal pressure.

Indicator 6.1. Prosecutor General is appointed and dismissed transparently and on the objective grounds

Background

The appointment and dismissal of the Prosecutor General is not based on objective and transparent grounds. Prosecutorial governance bodies do not play a role in this process. The relevant rules have not changed since the IAP 4th round of monitoring which found the process for both appointment and removal to be largely controlled by the political process. Since the Revolution of Dignity in 2014, 6 different people have held the position for varying periods of time. Under the current administration, the Verkhovna Rada

[69] OECD/ACN (2017), Fourth monitoring round report on Ukraine, pp. 92-93.

voted out the last Prosecutor General who was perceived as highly independent and impartial with a significant reform agenda just 6 months after his appointment, with a stated reason being the inefficient implementation of his mandate. The current Prosecutor General, the former head of the State Bureau of Investigations (SBI), is perceived to be appointed based on loyalty to the President.

Assessment of compliance

Benchmark 6.1.1.

The body of prosecutorial governance (e.g. a prosecutorial council) or an independent expert committee (formed by professionals who are themselves selected through a transparent procedure based on merit) played a key role in the appointment of the current Prosecutor General, in particular by providing an assessment of professional qualities and integrity of candidates

The benchmark evaluates the practice of the appointment of the Prosecutor General and promotes a merit-based procedure with minimal political influence. In Ukraine, the President appoints and dismisses the Prosecutor General with the consent of the Verkhovna Rada (Art. 40 PSL; Articles 131-1, 85.25.1, Constitution). The law does not provide for criteria or any process for evaluation of candidates by the President or by the Rada. If the Verkhovna Rada does not approve the proposed candidate, the President must propose a new one. Parliamentary rules of procedure provide for an approval by the competent committee of the Verkhovna Rada of the motions for appointment and dismissal of the Prosecutor General. Previously, in 2016, the law was amended to remove the requirement of a law degree for the Prosecutor General in what was perceived as an attempt to make the position suitable for the candidate the President preferred. According to the stakeholders, an informal ad hoc selection process was organised for the current Prosecutor General but it did not involve any form of assessment of professional qualities or integrity of the candidates. A body of prosecutorial governance or an independent expert committee did not play any role in the appointment of at least the past five or the current Prosecutor General.

Against this background, the law provides the head of the Specialised Anti-Corruption Prosecutor's Office is appointed through a competitive merit-based selection process. This issue is covered under PA 13.

Benchmark 6.1.2.

Prosecutor General is appointed for one long term (at least 5 years) without the possibility of reappointment

The Prosecutor General is appointed for six years, reappointment is possible, but the same person cannot serve for two consecutive terms (Art. 131-1, Constitution).

Benchmark 6.1.3.

There is a clear and transparent procedure for dismissal of the Prosecutor General based on objective grounds that exclude political or other undue interference and there were no cases of dismissal outside of such procedure

The law provides that the Prosecutor General is dismissed by the President with the consent of Verkhovna Rada (Art. 131-1, Constitution, Art. 42 PSL). The Parliament can initiate a no confidence vote (Art. 85, Constitution) and the Disciplinary Commission of the Prosecutor General's Office can submit to the President a proposal for removal of the Prosecutor General as a result of disciplinary proceedings. Clear grounds for dismissal are not provided. The Parliamentary Rules of Procedure defines a procedure for parliamentary consideration of dismissal of the Prosecutor General, but it is not clear and transparent or based on objective criteria and not sufficient to preclude political or other undue influence over such decisions. Given that the primary laws do not establish a clear and transparent procedure for dismissal of the Prosecutor General and do not contain grounds for dismissal, which would be narrowly and clearly defined and based on objective facts and not political or personal preferences.

In practice, the last Prosecutor General was dismissed after about 6 months of service as a result of the Verkhovna Rada's no confidence vote. The stated reason for the dismissal was inefficient exercise of the mandate, such as slow investigations of high-profile criminal cases which appears pretextual given the time period in office.

Benchmark 6.1.4.

There is a wide perception among the main stakeholders that the current Prosecutor General was appointed through a transparent and merit-based procedure and that the dismissal of the Prosecutor General (if happened) was not politically motivated

There is a wide perception among the main stakeholders that the appointment and dismissal of the Prosecutor General in Ukraine are decisions that are entirely politically motivated unbounded by established criteria or even legal qualifications. Stakeholders interviewed during the visit referred to the recent examples of the dismissal of the last Prosecutor General and the appointment of the current one, and previously, the removal of the requirement of a law degree that allowed a previous Prosecutor General, Lutsenko, to be appointed.

According to the CSOs who responded to the monitoring questionnaire, the current Prosecutor General is perceived to have been appointed based on her loyalty to the President. Stakeholders interviewed during the visit further noted that under her leadership the ambitious reform initiated by the previous Prosecutor General was stalled and regressive initiatives emerged, such as bringing back the old soviet practice of special ranks of prosecutors. It is perceived that the dismissal of the previous Prosecutor General was influenced by pro-Russian and pro-oligarch forces and linked to the comprehensive and ambitious two-year reform he and his team has initiated. According to stakeholders, in the short time served, he demonstrated a high level of independence and impartiality and brought competent senior managers to his team.

Indicator 6.2. Appointment and promotion of prosecutors are based on merit and clear procedures

Background

The prosecution service has undergone several rounds of reforms. In the 2015-2016 period, reforms included procedures for merit-based appointment of prosecutors but in practice the process was not considered competitive and transparent.[70] In September 2019, following the launch of a new two-year comprehensive reform of the Prosecution Service of Ukraine under the leadership of the previous Prosecutor General,[71] the ordinary permanent procedure for selection, appointment and promotion was suspended, and replaced by a temporary one aimed at speedy vetting of all practicing prosecutors for knowledge of the law, job requirements and integrity and filling in vacancies through a merit-based selection process involving international experts. This was aimed at downsizing and perceived to be directed at removing incompetent and unethical prosecutors from the Prosecution Service and recruiting highly professional prosecutors with integrity. The transition phase ended on 1 September 2021 and the regular procedures provided by Prosecution Service Law (PSL) are in effect, but the body in charge of the appointment and promotion process has to be set-up anew, as its mandate was also terminated in September 2019.

Some stakeholders criticised the highly discretionary nature of this reform that accumulated all the powers in the Prosecutor General, without proper regulations in the law and checks and balances. For example, the powers to adopt regulations on conducting selection, vetting and disciplinary proceedings as well as forming the temporary commissions responsible for these functions have been concentrated in the Prosecutor General.

The monitoring evaluates the temporary regulations and practices that were in place in the reporting period. The regular procedures set out in the PSL are also highlighted but not taken into account for the assessment. These will be captured in the next year's assessment, as most of the suspended provisions of the PSL came back into force starting September 2021.

[70] OECD/ACN (2017), Fourth Monitoring Round Report on Ukraine, pp. 92-93.
[71] The Law on "Amendments to Certain Legislative Acts of Ukraine Concerning Priority Measures for the Reform of Prosecution Bodies".

Assessment of compliance

Benchmark 6.2.1.

Prosecutors are recruited based on competitive procedure clearly set in the law and based on merit

Outstanding in Ukraine: Temporary competitive procedure applicable in the reporting period was based on merit but was not clearly set in the primary law.

The benchmark looks into the law and practice of recruitment of prosecutors under the primary law. Here, during the period covered by the monitoring, the law in place was suspended and a temporary procedure was applicable, regulated by the Law of the Reform of the Prosecution Service and Decree of the Prosecutor General. While the temporary procedure was competitive and merit-based and had positive underlying objectives, it could not be considered as clearly provided by law, as it was mainly defined in the Decree of the Prosecutor General, and the permanent recruitment procedure provided by the PSL was not applicable. The monitoring team also takes note that GRECO found unsatisfactory the replacement of the ordinary system of recruitment and career progression of prosecutors with temporary personnel commissions, without regulating by law their composition, functions and procedures.[72]

Temporary Personnel Commissions responsible for selection of prosecutors composed of 6 members, three designated by international organisations and three by the PGO, were responsible for the selection. Decisions were taken with 4 votes. The selection stages included an IQ and adaptability tests, written tests and an interview, followed by a month of initial training and tests before the appointment at district prosecutor's offices, but no requirement of any prior practical experience.

In the same way, the vetting (attestation) of all prosecutors already hired was carried out by Personnel Commissions involving the same process as for the selection of candidates.

In 2019-2021 (September inclusive), in total 1595 prosecutors had been dismissed as a result of the vetting. At the time of the visit, 707 prosecutors had been appointed. At the PGO, out of 885 former prosecutors 115 were appointed that is only 13%. There have been 1900 appeals of these decisions in Supreme Court and 5 cases have been decided upon so far.

At the time of the visit, a total of 504 vacancies remained to be filled, which could mean that serious understaffing of the Prosecution Service exists. The representatives of the prosecution service interviewed during the visit alerted the monitoring team about the need to urgently proceed with the selection process to fill in the vacancies. But according to the stakeholders, the process has slowed down under the leadership of the current Prosecutor General. At the same time, there were suggestions that the Prosecution service should not increase to reach its former bloated levels.

The monitoring team also notes that the ordinary procedure that was suspended during the review period (Art. 28-33 of the PSL) and was to be resumed in September 2021 but the body in charge - a Disciplinary

[72] GRECO (2019) Fourth Round of Evaluation: Compliance Report on Ukraine, para 134.

Commission – was not established at the time of the on-site visit. Along with setting up this body, the authorities stated that the law governing the procedure needs to be amended to ensure the requirement of practical experience before entering the prosecution service and a draft law is with Verkhovna Rada. It would be important to ensure that any new regulations do not preclude the new candidates, without the experience in the criminal justice system, are not precluded from applying, which seem to be the case with earlier initiatives of the Verkhovna Rada.[73] According to the NGOs, the procedure of appointment of prosecutors could be improved by adding additional stages (e.g., psychological testing, general skills testing) and more attention devoted to the integrity and ethics. The monitoring team was informed that the relevant law was enacted in July 2021, which will be analysed in the next year's review report.

Benchmark 6.2.2.

Prosecutors are promoted based on competitive procedure clearly set in the law and based on merit

Outstanding in Ukraine: Prosecutors were not promoted based on competitive procedure clearly set in the law and based on merit

The absence of specific rules or criteria for promotion of prosecutors was a concern of the 4th round of monitoring. GRECO also recommended "regulating in more detail the promotion/career advancement of prosecutors so as to provide for uniform, transparent procedures based on precise, objective criteria, notably merit, and ensuring that any decisions on promotion/career advancement are reasoned and subject to appeal".[74]

In the reporting period, prosecutors were being promoted based on a temporary competitive procedure organised by dedicated temporary personnel commissions. But according to the authorities, the criteria and procedure were not set in the law, the commissions defined the criteria themselves and employed wide discretion. Furthermore, due to the absence of criteria and a clear process, supervisors could influence the promotions to a high degree.

The monitoring team notes, however, that a new regulation for competitive promotion of prosecutors was adopted on 31 May 2021, developed in cooperation with international experts. It provides for the criteria and process for the assessment of qualifications and integrity of candidates with the participation of experts designated by the international community together with those selected by the Prosecutor General on an equal footing (four plus four).

[73] ANTAC, MPs of the Law Enforcement Committee suggest to roll back the reform of the Prosecutor's Office.
[74] GRECO (2017), Fourth evaluation round, Evaluation report on Ukraine, pp. 58-59.

Benchmark 6.2.3.

The vacancies, with the terms and conditions, and results of all stages of the selection and promotion of prosecutors are announced online.

In line with the law, vacancies, with the terms and conditions, and results of all stages of the selection of prosecutors are published online on the website of the PGO. Results of qualification exams, together with the list of proposed candidates with ranking is also publicly available. These publication requirements and practices extend to appointments to higher positions (promotion).

Indicator 6.3. The budget of the public prosecution service and remuneration of prosecutors guarantee their financial autonomy and independence

Assessment of compliance

Benchmark 6.3.1.

The funding received by the public prosecution service is sufficient to ensure its autonomy

The budget of the prosecution service of Ukraine has increased in the last three years. According to the NACP, the annual increases are not intended to influence its autonomy but rather to catch up to reasonable levels, especially in light of the relatively high NABU salaries. In 2021, the prosecution service was allocated only 57.2% of the requested budget. 90.6% of the allocations was the salary fund. But the increase was significant over 2019 and 2020.

Table 6.1. The funding received by the public prosecution service

Year	2019	2020	2021
Budget	7 261, 7 million UAH (229 802 Euro).	7 858,1 million UAH (288 266 Euro)	11 531,5 million UAH (332 322 Euro) (57.2% of the requested budget)

According to the CSOs responses to the monitoring questionnaire, budgetary allocations for the functioning of the Prosecution Service in Ukraine are stable and sufficient. During the visit, however, representatives of the Prosecution Service indicated that the budget is not sufficient to ensure its autonomy, and it does not even fully cover the salaries of prosecutors. In 2020, the budget of the prosecution service was about half of the budget of the judiciary. Prosecutors are twice as numerous as judges. While additional funds may be needed, the entire government is short of funds and it does not appear that the current budget levels are engineered to undercut the autonomy of the prosecution service. To the extent that the monitoring team obtained information that the Prosecution Service was not seen as independent from political pressures, the issues were mainly, though not exclusively, at the highest levels.

Benchmark 6.3.2.

The level of remuneration of prosecutors is fixed in the law, does not depend on the discretion of superior prosecutors and is sufficient to ensure the autonomy of prosecutors and reduce the risk of corruption

Outstanding in Ukraine: The prosecutors are payed less than the amount fixed in the law due to the capped minimum salary under the State Budget Law 2021. The annual bonuses are discretionary.

Remuneration of prosecutors is defined in the law and consists of a base salary, bonuses and additional payments for length of service, for holding an administrative position (e.g. head of the prosecution office) and other payments (Art. 81 PSL). The level of salaries has increased (from 15 to 20 minimum salaries as of 1 January 2021) but is still low compared to judges, SAPO prosecutors and NABU detectives. Moreover, the 2021 law on State Budget artificially decreased the minimum salary for calculating salaries of prosecutors (UAH 1600 compared to UAH 2102 for other state bodies). While the calculation of salaries in this way allows for little room to manipulate individual prosecutor's behaviour, having remuneration of prosecutors at low salary levels has the effect of undermining legal guarantees for the autonomy of prosecutors and may undercut the ability to recruit and retain candidates with high integrity.

In analysing bonuses, the amount of the prosecutor's annual bonus may not exceed 30 percent of their annual salary. A bonus is paid once a year based on the successful performance of duties, but depends on the superior prosecutor's evaluation without clear criteria provided by the Prosecutor General's decree. This practice will be changed starting 2021, with the adoption of the new procedure for evaluation of prosecutors, which plans to link bonuses with the performance objectives and end of year evaluations. The monitoring team did not have an opportunity to review this document.

Indicator 6.4. Status, composition and operation of the Prosecutorial Council guarantee the independence of the public prosecution service

Background

The following prosecutorial governance bodies are envisaged under the law on the Prosecution Service.

The Conference of Prosecutors, representing all Ukrainian prosecutors, is the highest self-governance body. It hears the reports of the Council of Prosecutors on the performance of tasks of prosecutorial self-governance bodies, funding, and organizational support of the Prosecutor's Office.

The Council of Prosecutors among other functions, is responsible for making recommendations on the appointment and dismissal of high-level prosecutors (i.e.: head and deputy head of the prosecution office) as well as overseeing measures to ensure the independence of prosecutors. This body had not been operational since 2019 due to the lack of a quorum. At the same time, it seems that one decision was made in June 2020.

The Disciplinary Commission of Prosecutors is a collegial body that evaluates the professional qualification of candidates to prosecutorial positions and decides on disciplinary liability, dismissal and transfer of prosecutors. During the reporting period, this body was dismantled and replaced by the temporary personnel commissions described above. Its reform is pending.

Several temporary personnel commissions had been set up by the Prosecutor General for selection of prosecutors, vetting, promotion and disciplinary proceedings and were functioning at the time of the monitoring. After the visit, following the end of the transition period, relevant bodies seem to have been formed and the temporary commissions have ceased to exist. The formation of these new bodies, their composition and operations will need to be analysed next year.

Assessment of compliance

Benchmark 6.4.1.

The Prosecutorial Council or other similar bodies are set up and function based on the law that defines their powers and mode of operation

Outstanding in Ukraine: Prosecutorial Council is not operational and new Disciplinary Commission had not been set up yet. Temporary Commissions do not meet the requirements of the benchmark

At the time of the visit, the Prosecutorial Council was not operational due to the lack of a quorum, as some of its members have been appointed to other administrative positions but its secretariat was in place. The new composition is expected for autumn 2021. The previously existing Qualification and Disciplinary Commission of Prosecutors, now called the Disciplinary Commission is also dismantled and awaiting new composition. The stakeholders informed the monitoring team of developments regarding the new composition of these relevant bodies. At the same time, the monitoring team cannot ascertain if the Prosecutorial Council and Disciplinary Commission have been set up and function in practice.

Benchmark 6.4.2.

The composition of the Prosecutorial Council or other similar bodies includes a substantial part (at least half) of prosecutors elected by their peers from all levels of the public prosecution service. The Prosecutorial Council is independent of the Prosecutor General and the executive branch

Outstanding in Ukraine: The Council and the Disciplinary Commission have not functioned since 2019. Prosecutorial members or the Council do not seem to be elected by peers

According to the law, the Council of Prosecutors is composed of 11 prosecutors from various levels of the prosecution offices, appointed by the All Ukrainian Conference of Prosecutors, and two legal scholars elected by the Congress of Academia. Prosecutors holding managerial positions and those members of the Disciplinary Commission of Prosecutors cannot be members of the Council. According to CSOs, the Council of Prosecutors was not independent in its operations.

The new composition of the Disciplinary Commission seems to have been set up after the visit. The new composition will need to be analysed next year.

According to the Prosecutor General's decrees, temporary commissions for selection and vetting included 3 members selected by the Prosecutor General and 3 members proposed by the international community. With the same ratio half/half the commission for promotion included 8 members and the temporary commission for discipline included 7 members selected by the Prosecutor General.

During the review period both the temporary commissions and permanent bodies lack the requirement of election by peer prosecutors to ensure an appropriate level of independence from the Prosecutor General and executive branch.

Benchmark 6.4.3.

The composition of the Prosecutorial Council or other similar bodies includes a substantial number (if not half) of non-prosecutorial members who represent the civil society or other stakeholders that have public trust (e.g. academia, law professors, human rights defenders, NGO representatives), have an appropriate legal qualification and are selected through a transparent procedure based on merit

Outstanding in Ukraine: The number of non-prosecutorial members is not substantial. They are not selected through a transparent merit based procedure.

The current composition of the Prosecutorial Council includes only 2 non-prosecutorial members. These are elected by secret ballot by the Congress of Academia but are not themselves selected through a transparent procedure based on merit. The Disciplinary Commission was not in place during the reporting period. The temporary personnel commissions for selection and attestation did include non-prosecutorial members representing international partners but they do not seem to have been selected through a transparent procedure based on merit.

Benchmark 6.4.4.

There is a wide perception among the main stakeholders that the Prosecutorial Council or other similar bodies operate independently and impartially without political or other undue interference in their work

As regards the permanent self-governing bodies, the Qualification and Disciplinary Commission was seen as selective in its disciplinary proceedings by CSOs responses to the monitoring questionnaire.[75] Stakeholders referred to the decision in the case of the former Head of SAPO,[76] who was allowed to remain in his position despite violations and was given only a reprimand. In a case of a SAPO prosecutor, a member of the commission was believed to be acting in conflict of interest when taking a decision on the disciplinary case of a SAPO prosecutor.[77] As to the current temporary disciplinary commission, according to stakeholders, there had been certain attempts by the Prosecutor General to use them for pressuring anti-corruption prosecutors, however, these disciplinary proceedings were closed.

[75] ANTAC (20 May 2018), Map of Anticorruption conditionalities, Kholodnytskyi's aquarium case – will the prosecutors' commission haul in "the big fish"?
[76] Pravda (26 July 2018), Kholodnytsky was reprimanded; Euromaiden Press (27 July 2018), Ukraine's main anti-corruption prosecutor keeps office despite gross violations of professional ethics.
[77] Radio Free Europe (29 March 2018), The prosecutor in Martynenko's case was reprimanded on the conclusion of Shemchuk, who is a witness in the same case.

Indicator 6.5. The Prosecutorial Council has broad responsibility for the functioning of the public prosecution service, is transparent and impartial

Assessment of compliance

Benchmark 6.5.1.

The Prosecutorial Council or another similar body is responsible for all questions of the career (including selection, promotion, transfer) and discipline of prosecutors

Outstanding in Ukraine: Permanent prosecutorial governance bodies responsible for the listed issues have not been operational. Temporary Commissions do not meet the requirements of the benchmark.

Under the permanent procedure, the Prosecutorial Council is responsible for making recommendations on the appointment and dismissal of prosecutors from high-level positions, and Disciplinary Commission for the selection of prosecutors. However, in the transition period these functions have been assigned to various temporary commissions as described above. These Commissions are not created based on a primary law but decrees of the Prosecutor General. They also cannot be regarded as independent bodies of prosecutorial governance.

Benchmark 6.5.2.

The Prosecutorial Council or another similar body is responsible for the performance evaluation of prosecutors that is conducted based on clear, objective criteria and transparent procedures

The Prosecutorial Council or another similar body is not responsible for the performance evaluation of prosecutors in Ukraine.

A provisional regulation of evaluation of performance of prosecutors has been in force since October 2020 (Order of the Prosecutor General). Based on the evaluation, end of year bonuses were provided. Prosecutors were evaluated by their immediate supervisors, taking into account the “effectiveness of their performance”, “number and quality of tasks performed” and “compliance with internal regulations”. These however are not clear and objective criteria, they are general and vague. Thus, the existing procedure did not exclude sufficiently subjectivity and arbitrariness.

The authorities reported during the visit that a permanent procedure developed in cooperation with international experts entered in force in May 2021, but the document is not available on the legislative portal of Ukraine and the monitoring team did not have an opportunity to review it.

Benchmark 6.5.3.

The proceedings and decisions of the Prosecutorial Council or other similar bodies, including their justification, are available for the public scrutiny

Decisions of the Prosecutorial Council have been published on its website, however these usually did not include justifications. The last decisions are from 2019, since the Council has not been operational since then. As regards decisions of the temporary commissions, they appear to be routinely published with justifications.

Benchmark 6.5.4.

Members of the Prosecutorial Council or other similar bodies comply with the conflict of interest rules in their work

The monitoring team is unaware of separate conflict of interest rules envisaged for the Prosecutorial Council and the Disciplinary Commission. Unlike judicial governing bodies, the CPL does not specifically mention them either, but as this law extends to all state collegial bodies (Art. 3.1.1.i), it covers prosecutorial governance bodies as well. By contrast, Orders of the Prosecutor General for the temporary personnel commissions include relevant regulations (Para 9, Procedure of Personnel Commissions, Order of the Prosecutor General 2019).

During the visit, the authorities confirmed that general conflict of interest rules apply to these bodies and cited 11 recusals in the practice of personnel commissions. The authorities also indicated, that additional specific rules may be provided in the new Regulations of the Prosecutorial Council when it is approved.

Indicator 6.6. Assignment of cases among prosecutors is transparent and objective; prosecutors can challenge orders they receive

Assessment of compliance

Benchmark 6.6.1.

The assignment and re-assignment of cases among prosecutors is based on clear and transparent rules that are set in the legislation and ensure impartiality and autonomy from external and internal pressure

The benchmark requires that the law set clear (unambiguous) rules that are published and regulate issues of assignment and re-assignment of cases among prosecutors. The rules must set an exhaustive list of objective grounds for reassigning the case from one prosecutor to another that is grounds that are based on objective necessity and not personal preferences or undue considerations.

In Ukraine, heads of prosecution offices are required to assign cases to prosecutors in line with the investigative jurisdiction (Article 216 of CPC) considering the complexity of the case, workload, professional skills and experience of prosecutors (Art. 37, CPC and Order of the Prosecutor General of Ukraine 28.03.2019 № 51). The prosecutor is then usually responsible for the case from the start until the end of the proceedings. However, the head of the relevant prosecution office may re-assign the case to another prosecutor in particular circumstances (due to disqualification, serious disease, dismissal, or as an exception due to ineffective supervision over the pre-trial investigation). These grounds even though provided by law are not sufficiently clear and precise to limit the discretion and exclude undue considerations. The distribution of cases among prosecutors thus is not random, depends on the discretion of the supervising prosecutor and is not based on clear and transparent rules that would ensure impartiality and independence from external or internal pressure. According to the government, in practice the biggest concern is the assignment of cases to prosecutors of the Specialized Anti-Corruption Prosecutor's Office (SAPO) and reassignment of certain cases under its exclusive jurisdiction from the SAPO (see PA 13).

The 4th round monitoring report on Ukraine echoed GRECO's recommendation to introduce "a system of random allocation of cases to individual prosecutors, based on strict and objective pre-established criteria including specialisation, and experience coupled with adequate safeguards – including stringent controls – against any possible manipulation of the system".[78]

During the visit, the authorities informed that the e-case management system that will be introduced soon may prepare grounds for introducing an automatic allocation of cases system in the future. However, during this reporting period, serious questions have been raised about the reassignment of cases from the SAPO to others outside of the law as described under PA 13.

Benchmark 6.6.2.

Prosecutors routinely use the right to challenge orders from their superiors through a judicial or another independent procedure

For this benchmark to be met, the law shall clearly set the right of prosecutors to challenge orders of their superiors through a judicial or another independent procedure and the practice must show that prosecutors routinely used this procedure during the past calendar year.

In Ukraine, prosecutors can notify the Council of Prosecutors about the orders of their supervisors, including the Prosecutor General,[79] and file disciplinary complaints against supervisors.[80] The Council of Prosecutors considers applications of prosecutors and other information regarding any threat to independence of prosecutors and take follow-up actions. There is no remedy through the Courts.

However, the authorities could not demonstrate the practice of application of these provisions in the reporting period, pointing to the fact that the Council has not been operational. Authorities did refer to the

[78] GRECO (2017), Fourth evaluation round, Evaluation report on Ukraine.

[79] See Art. 16 of the Law on the Prosecutor's Office of Ukraine.

[80] According to point 8 Part 1 of Article 43 of the Law of Ukraine "On the Prosecutor's Office" composition of disciplinary misconduct such actions: «an intervention or any other influence of a prosecutor in cases or the manner other than established by the law related to the work of another prosecutor, staff members, officials or judges, including through public statements about their decisions, actions or inaction in the absence of signs of an administrative or criminal offense».

past practice of using the right to appeal to the Prosecutorial Council by prosecutors when it was operational.

Indicator 6.7. Prosecutors are held accountable through impartial decision-making procedures that protect against arbitrariness

Background

Disciplinary responsibility of prosecutors is provided in the Section VI of the PSL, including grounds, responsible body and conduct of proceedings. Section VII defines the procedure and grounds for dismissal of prosecutors.

In the transition period, most of these provisions have been suspended and regulated by the Law on the Reform of the Prosecution Service and the Decree of the Prosecutor General. The Special personnel commission has been set up for disciplinary proceedings. The "relevant body conducting disciplinary proceedings," the Disciplinary Commission, a permanent body responsible for discipline, transfer and dismissal of prosecutors, among other issues, had been dissolved. Even though the ordinary procedure under the law was resumed on 1 September 2021, the body is not set-up yet.

Assessment of compliance

Benchmark 6.7.1.

Clear grounds and procedures for the disciplinary liability and dismissal of prosecutors are clearly stipulated in the law

Outstanding in Ukraine: Grounds for disciplinary liability are not clear. Procedures are clearly set up in the law but relevant provisions are replaced by the PG Decree in the reporting period, which is not in line with the benchmark.

Grounds for disciplinary liability are defined in the law (Art. 43, PSL), but most of them are ambiguous and open the possibility for arbitrariness and abuse in their application. For example, the grounds include: "committing acts which discredit the title of a public prosecutor and may cast doubt on their objectivity, impartiality and independence, on honesty and integrity of prosecution authorities", "failure to perform or improper performance" of official duties, "violations of prosecutorial ethics", "violation of internal service regulations". Currently, the Code of Professional Ethics and Conduct of Prosecutors also defines ethics rules in terms perceived as too general and thus not adding any clarity to the listed grounds.

The grounds should be narrowly and precisely defined to ensure that disciplinary proceedings are not used for improper interference in the independent exercise of the prosecutorial mandate. Clear grounds of disciplinary liability mean that as much as possible the law expressly states all the actions or inaction that can result liability, that grounds are formulated narrowly and unambiguously, that there is no overlap or contradiction among different grounds. The monitoring team takes note of the GRECO compliance report

concluding that Ukraine has not implemented the recommendation to define "disciplinary offences relating to prosecutors' conduct and compliance with ethical norms more precisely".[81]

While the grounds for dismissal set out on Section VII of the PSL seem clear and precise, this is not the case with disciplinary liability. As regards disciplinary procedures, the law did not define the main stages of the proceedings with sufficient detail for the temporary procedure. The procedure provided by primary law was not applicable.

Benchmark 6.7.2.

Application of disciplinary and dismissal procedures is perceived by the main stakeholders to be impartial

Stakeholders do not perceive the application of disciplinary and dismissal procedures as impartial. Nor do they perceive the sanctions to be dissuasive and proportionate. Civil society answers to the monitoring questionnaire refer to biased and inconsistent practices of sanctioning citing a research conducted in 2019.[82]

Benchmark 6.7.3.

There are sufficient procedural guarantees of the due process for a prosecutor in the disciplinary proceedings, including the right to be heard and employ a defence, the right of judicial appeal

The law should set out fair disciplinary proceedings guarantees for prosecutors. Such guarantees should include, as a minimum, the right to be heard, the right to employ a defence counsel, the right to appeal disciplinary decision in court. The temporary procedure mirroring the guarantees set in the PSL Art. 47 includes these rights, but is regulated by Decree of the Prosecutor General. Decisions can be appealed in administrative court or High Council of Justice. While the procedure applicable in the reporting period seems to meets the benchmark, it is not regulated by the primary law but the decree of the Prosecutor General.

Benchmark 6.7.4.

The final decisions or case summaries regarding discipline of prosecutors are published online including their justification

The final decisions regarding discipline of prosecutors including their justifications are published.

[81] GRECO (2019) Fourth Round of Evaluation: Compliance Report on Ukraine, p. 27.
[82] Council of Europe (2019), Report on Disciplinary Responsibility of Prosecutors in Ukraine.

Benchmark 6.7.5.

Proportionate and dissuasive disciplinary sanctions are routinely applied to prosecutors

Different types of disciplinary sanctions should be available and applied for different disciplinary offences for sanctions to be proportionate. Dismissal of a prosecutor should be possible only in exceptionally serious cases. To be dissuasive, sanctions have to be strong and effective. The sanction may be ineffective if there are cumbersome procedures to implement the sanction or if there is an insufficiently long statute of limitations period or broad exemptions from the liability.

Under the law, disciplinary sanctions include reprimand, one-year ban on promotions, and dismissal from the office (Art. 49 of the PSL). The statute of limitation is one year regardless of vacation or the temporary disability of the prosecutor. The monitoring team notes that GRECO recommended extending the range of disciplinary sanctions available to ensure better proportionality and effectiveness and extending the statute of limitations.[83]

In 2020, the Personnel Commission received a total of 1,217 disciplinary complaints. 274 disciplinary proceedings were opened and in 917 complaints the members of the personnel commission made decisions to refuse to initiate disciplinary proceedings. The Personnel Commission issued 318 decisions involving 217 persons. In 158 instances they closed disciplinary proceedings against 179 persons and in 22 cases, decisions were made to impose disciplinary sanctions in the form of 25 reprimands; 26 dismissals and 12 cases of bans on promotion.

There are a high number of instances in which the Commission declined to open a case. This suggests that there is a range of conduct that is either not properly investigated or for which there is no appropriate sanction. The authorities clarified that the failure to open cases is often due to the lack of substantiation of complaints.

Benchmark 6.7.6.

All public allegations of corruption of prosecutors were thoroughly investigated with justified decisions taken and explained to the public

The monitoring team is unaware of public allegations of corruption specifically of prosecutors that were not investigated. However, there are concerning circumstances reported on which there appears to be incomplete information to make a clear determination whether certain reported conduct rises to the level of corrupt conduct. According to the evidence collected during the monitoring, there are several instances when senior prosecutors from the PGO have used their authority to prevent the opening of cases or to

[83] According to GRECO such sanctions may include, for example, reprimands of different degrees, temporary salary reduction, temporary suspension from office, etc, Ukraine Evaluation Report 2017 para. 260.

transfer cases under the jurisdiction of the NABU and SAPO[84] and have even allowed matters to be filed before judges who dismiss them under circumstances where appeals are not available. These instances which give rise to serious concerns are discussed in detail under PA 12.

In addition, a journalist published an investigation on undeclared and unexplained expensive assets of prosecutors that did not result in any follow up.[85] These appear to be happening during the period when the SAPO Head is not selected yet and the law does not provide for an acting Head to have the same duties and responsibilities as the Head, thus, the layer of insulation from arbitrary or political interference provided in the law in sensitive cases is missing. According to the information provided to the monitoring team after the visit, the NACP conducted a lifestyle monitoring on this case but no credible evidence was collected. The monitoring team is not aware of any explanations provided to the public on this case.

Accordingly, as the mentioned instances do not appear to be investigated with justified decisions taken and explained to the public.

[84] NABU (24 December 2020), Official statement – Prosecutor General's Office provides an unprecedented interference in the NABU investigation; NABU (31 December 2020), Courts and Prosecutor General's Office illegally try to protect former Minister in the administration of President Viktor Yanukovych.
[85] Bihus Info (3 August 2020), Прокурор із сокирою напав на сусідів і "спалив" котедж в Козині.

7 Integrity in Public Procurement

Primary public procurement legislation covers all areas of economic activities concerning public interests including state owned enterprises, utilities and natural monopolies, as well as the non-classified area of the defence sector. Exemptions from competitive procurement are limited and clearly defined. It is worth noting, that the Law of Ukraine "On Public Procurement" (hereinafter “PPL”) was amended recently to exclude the COVID-19 pandemic related procurement during the quarantine period, which has officially been established by the Cabinet of Ministers of Ukraine, but the results are made public in the electronic procurement system. The Ukrainian electronic public procurement system (“Prozorro”) is mandatory for central authorities, monopolies and other public contracting authorities, it is functional and encompasses all procurement processes. Procurement remains open for foreign bidders, but there is a draft law that may affect this negatively. Procurement complaints are properly addressed, and the review body operates independently and impartially. There is a low track record of prosecution of corruption offences and enforcement of conflict-of-interest restrictions in the procurement process. A wide range of procurement related data and statistics are published online. Data is available in machine-readable (open data) format.

Indicator 7.1. Public procurement system is comprehensive and well-functioning

Background

Public procurement in Ukraine is regulated by the PPL.

Assessment of compliance

Benchmark 7.1.1.

Primary public procurement legislation covers all areas of economic activities concerning public interests including state owned enterprises, utilities and natural monopolies, as well as the non-classified area of the defence sector

The PPL covers all areas listed in this benchmark.

Contracting authorities in accordance with the PPL are:

- public authorities and local governments;
- social insurance bodies;
- enterprises, institutions, organisations, if they are majority owned or controlled by a public authority;
- legal entities and/or economic operators operating in one or several certain areas of economic activity, if they are majority owned or controlled by a public authority.

There is a separate Law "On Defence Procurement", which was adopted in July 2020 and entered into force in January 2021. This law addresses, inter alia, the non-classified area of the defence sector.

According to the Government, subsidiaries of SOEs are not considered SOEs, hence they are not covered by the PPL.

Benchmark 7.1.2.

The legislation clearly defines specific, limited exemptions from the competitive procurement procedures

The PPL defines the limited exemptions from competitive procurement procedures.

According to Art. 13 of the PPL, procurement can be carried out by applying one of the following competitive procedures:

- open bidding;
- bidding with limited participation;
- competitive dialogue.

As an exception and in accordance with the conditions specified in Art. 40.2 of the PPL, procuring entities may apply the negotiated procurement procedure.

In addition, on 17 March 2020, following the outbreak of the COVID-19 pandemic, the PPL was amended by the Law "On Amendments to Certain Legislative Acts of Ukraine Aimed at Preventing the Occurrence and Spread of Coronavirus Disease (COVID-19)" (hereinafter "COVID-19 Act"). It was established that the PPL shall not apply to cases where the procurement items are goods, works or services necessary for the implementation of measures aimed to prevent the emergence, spread, localisation and elimination of the coronavirus outbreaks, epidemics and pandemics. The list of such goods, works or services and the respective procurement procedure has to be approved by the Cabinet of Ministers of Ukraine. The results of such procurement must be made public by the procuring entities in the electronic procurement system, in accordance with the requirements as set forth in article 10 of the PPL.

According to publicly available data (https://covid.dozorro.org/), during the period 18 March 2020 to 18 March 2021, 148,626 contracts were awarded under the COVID-19 Act, at a value of approximately UAH 30.35 billion (EUR 0.94 billion equivalent). This represents approximately 4% in the number of tenders and 2.5% in contract value of the total volume of procurement in Ukraine in 2020.

Benchmark 7.1.3.

Public procurement procedures are open to foreign legal or natural persons

PPL guarantees equal opportunities for participation in procurement procedures to all entities, both domestic and foreign.

However, TI Ukraine reported that the Ukrainian parliament registereddraft law 3739, which allows only those companies to participate in public procurement who will be able to localise their production in Ukraine. This would apply to certain products, including mechanical engineering, as defined in the draft law. Another initiative on localisation is a resolution of the Cabinet of Ministers, which aims at introducing a non-price criterion in the procurement of mechanical engineering.

Benchmark 7.1.4.

Electronic procurement system is functional and encompasses all procurement processes

The main legislative act that regulates the functioning of the national electronic procurement system and contains the main provisions of the system is the PPL, which as of 1 April 2016 made the Ukrainian electronic public procurement system ("Prozorro") mandatory for central authorities and monopolies, and for other public procuring entities from 1 August 2016.

Prozorro is an electronic platform that unites more than 35,000 state and municipal authorities and enterprises (customers of goods, works and services) and about 250,000 commercial companies (suppliers). This system radically improved transparency in public procurement and allowed preventing many corruption cases.[86]

The electronic procurement system is functional and encompasses all procurement processes.

However, the new law № 1530-IX (adopted on 3 June 2021) excludes procurement related to Constitution Day and Independence Day as well as the Kyiv Great Ring Road from being administered through Prozorro, thus reducing fairness and transparency of the procurement processes. Next year's evaluation should examine whether parliament continue to legislate to exclude public sector projects from procurement through the electronic procurement system and/or exempt them from using fully competitive procedures.

Benchmark 7.1.5.

Direct (single-source) contracting represents less than 10% of the total procurement value of all public sector contracts

According to the data provided by the Government, the procurement under the "Negotiated Procedure" and the "Negotiated Procedure on an urgent basis" together represent 21.1% in 2019 and 13.5% in 2020 of the total contracted public procurement value, as reported in Prozorro. In addition, "under threshold" direct contracting represented a further 22.1 % in 2019 and 15.3% in 2020 of the total contracted public procurement value. Particularly, procurement under the "Negotiated Procedure" and the "Negotiated Procedure on an urgent basis" represent more than 10% of the total procurement value of all public sector contracts.

[86] OECD/ACN (2017), Fourth monitoring round report on Ukraine, p.10.

Benchmark 7.1.6.

There is a wide perception among the main stakeholders that public procurement is fair and transparent

There is a wide perception among the main stakeholders that public procurement in Ukraine is fair and transparent. In 2019, TI Ukraine conducted a study, ”Behind the scenes of Prozorro: Does Ukrainian business trust public procurement." According to the survey, 54% of procurement participants were generally satisfied with the Prozorro system. This would suggest that a majority of businesses have confidence in the Ukrainian procurement system, which is handled, with a few exceptions, through the electronic procurement system (Prozorro). The evidence collected by the monitoring team both through answers to the monitoring questionnaire and the visit confirmed this finding.

Indicator 7.2. Procurement complaints are addressed

Background

According to the PPL, the Antimonopoly Committee of Ukraine (“AMCU”) is the dedicated appeals body for complaints concerning public sector procurement procedures.

The appeals procedure is defined in Article 18 of the PPL.

In order to ensure unbiased and efficient protection of rights and legitimate interests of persons as related to their participation in public procurement procedures, the AMCU has established the Permanent Administrative Board for handling complaints against violation of the public procurement legislation. Decisions of the Permanent Administrative Board are adopted in the name of the AMCU. The Complaint Review Body normally has to review a complaint within 10 business days following the start date of the complaint review proceedings. The time period of consideration of the complaint may be reasonably prolonged by the Complaint Review Body to up to 20 business days.

Assessment of compliance

Benchmark 7.2.1.

Procurement complaints review body routinely reviews procurement complaints within a reasonable time frame

All decisions on the review of complaints by the AMCU are made within a period not exceeding 20 working days from the date of the review of the complaint.

In 2020, the AMCU considered more than 11,600 complaints, for which the relevant decisions were made within the period specified by law and published on the Prozorro web portal. The deadline for consideration of any of the complaints did not exceed 20 working days, as required by the PPL. The average time for reviewing complaints in 2020 was about 10-15 working days.

This information can be verified on the Prozorro web portal (prozorro.gov.ua).

It has been noted that the amount of procurement complaints increases every year, from 19,595 in 2019 to 24,270 in 2020. In order to comply with the legal timeframe for adequately reviewing complaints, it is reasonable to assume that more human resources will be needed to address the workload.

Benchmark 7.2.2.

Procurement complaints review body decisions repealed by courts or other appeal body comprise less than 10% of all cases that have been referred to them

In 2019, 227 decisions of the AMCU, representing 1.2% of its total decisions (19,595), were appealed in court. For 2020, the numbers are 413 (1.7%) of 24,270 decisions. Of these, 13 cases (5.7%) were repealed in 2019 and 1 (0.2%) in 2020.

Less than 10% of all cases handled by the AMCU were repealed by courts.

Benchmark 7.2.3.

There is a wide perception among the main stakeholders that the procurement complaints review body functions in an independent and impartial manner without undue interference in its work

In Ukraine, there is a wide perception among the main stakeholders that the procurement complaints review body functions in an independent and impartial manner without undue interference in its work. The representatives of civil society organisations involved in the monitoring process have confirmed that the Permanent Administrative Body of the AMCU is seen as a very effective tool for protecting the rights of participants, and that it is perceived to be independent.

According to the analysis carried out by TI Ukraine in 2019, in one survey 60.8% of surveyed businesses were satisfied with the Complaints Board. Another study acknowledged positive developments introduced in 2020 that addressed previously high non-refundable cost of filing a complaint by introducing differentiated fee that is refundable if the complainant wins the dispute.

However, there is also the perception that appeals against public procurement in the courts are not very effective. This is primarily due to the lengthy court hearings, which can apparently take months.

According to the comments received after the on-site, the Law of Ukraine № 1530 of 3 June 2021 “On Amendments to the Law of Ukraine “On Public Procurement” and other laws of Ukraine on Improving the System of Functioning and Appeals of Public Procurement”, which entered into force on 26 June 2021, amended the Law of Ukraine “On Public Procurement purchases”.

One of the key amendments relates to appeals, significantly changing the procedure for filing complaints, violation of the procedure may lead to the fact that the complaint will not be accepted for consideration, and the participant will lose money for its submission. If the complainant challenges the terms of the tender documents, he must upload documentary evidence together with the complaint. The appellate body leaves the complaint without consideration if the complainant has not provided the relevant documentary evidence. There are already cases when the appellate body left the complaint without consideration due to failure to provide such evidence when appealing the terms of the tender documents.

Indicator 7.3. Dissuasive and proportionate sanctions are enforced for procurement related violations

Assessment of compliance

Benchmark 7.3.1. – 7.3.2

BENCHMARK	Ukraine 2020
	Total number of sanctions / convictions
7.3.1. Track record of sanctions imposed on public officials for violations of COI rules in public procurement	38
7.3.2. Track record of enforcement of corruption offences in the public procurement sector with final convictions	N/A*

Note: There were 3,736,879 public procurement tenders announced in 2020 in Ukraine according to data made available by the Ukrainian Government.

* Ukraine provided data on criminal offences that may involve violations in procurement sector (in total 1066 convictions) but stated that due to the absence of the specific criminal offence related to public procurement it is impossible to provide statistics. As in many other countries of the region, Ukraine collects statistics by Articles of the criminal (administrative) code and does not disaggregate data by sectors.

Benchmark 7.3.3

All legal and natural persons convicted for corruption offences were debarred from the award of public sector contracts

Under the PPL (Art. 17.1.1-3), all natural and legal persons who have been prosecuted for corruption-related offences automatically, and simultaneously with the entry into force of the relevant court decisions, are debarred from entering into government contracts.

Indicator 7.4. Public procurement is transparent with independent oversight

Assessment of compliance

Benchmark 7.4.1.

Key procurement data are published and regularly updated on-line on a central procurement portal free of charge in open data format, including at least the following:

- procurement plans;
- complete procurement documents;
- outcome of the tender evaluation, the contract award decision and the final contract price;
- appeals and the results of their review;
- Information on contract implementation.

All procurement data listed under benchmark 7.4.1 are published online on the central e-procurement portal "Prozorro". The data is published in JSON format in Prozorro (http://prozorro.gov.ua) in a format that allows automatic processing of selected data by computer systems.

Benchmark 7.4.2.

Beneficial ownership of all participants in a procurement process is revealed in procurement

The Prozorro electronic procurement system is integrated with the Unified State Register of Legal Entities (USR), and information on beneficial owners is automatically pulled from the USR in the form of a specially generated report. On this basis, the procuring entity can verify the ultimate beneficial owner. According to Art. 17.1, PPL, the procuring entity is obliged to reject the tender offer of the bidder or to refuse to participate in the negotiated procurement procedure that is described in Art. 40 of the PPL, if the Unified State Register of Legal Entities, Individuals - Entrepreneurs and Public Associations does not contain information about the ultimate beneficial owner.

Benchmark 7.4.3.

Detailed statistics on public procurement is regularly published online, including key public procurement indicators

Detailed statistics as required under this benchmark are available through the following electronic systems.

Public analytics module BI analytics - an analytical tool which contains data on all purchases made through the Prozorro system since 2015. The information is presented in the form of convenient tables, analytical graphs and diagrams. The tool is fully integrated with the Prozorro system, which allows users to analyse data as of the previous day.

Professional Analytics Module BI-Pro- a tool for users who wish to delve deeper into the field of procurement. It provides a comprehensive analysis of purchases through the Prozorro system based on more than 1000 different indicators. In addition, the Professional module allows the user to customise

tables and graphs of objects, or even create a user's own indicators. It is especially convenient that the user can save the results of their research and continue it at any time.

Access to the tool can be obtained by anyone who complies with the regulations and fills out the appropriate form. The data is publicly available and updated immediately in the Prozorro system. The public analytics module BI allows the user to analyse data as of the previous day.

8 Business Integrity

There has been reasonably good progress in the area of business integrity in Ukraine since the last Monitoring Round in 2017, at least in the sense of an augmented appreciation by authorities and the business community of the need for private and state-owned companies to operate fairly, transparently and ethically. Knowledge and experience in anti-corruption processes and practices are increasing, as is the depth and development of the anti-bribery and corruption compliance community in Ukraine more generally.

In key areas, for example, mechanisms to address concerns of companies related to corruption and bribe solicitation by public officials, Ukraine's efforts have been impressive; and the Business Ombudsman Council (BOC), it has a respected and effective institutional example for its regional peers to follow. Approval of the Draft Law on the Business Ombudsman Council, currently before the Verkhovna Rada, would further increase the BOC's operational effectiveness and institutional sustainability. Ukraine's online publication of beneficial ownership information, available in searchable format for free, is a well-known and welcome step towards transparency. The "Corporate Governance Code: Key Requirements and Recommendations" released in 2020 by the National Securities and Stock Market Commission (NSSMC) provides a useful tool for both listed and unlisted companies (including SOEs) seeking to manage their corruption risks.

Yet a recurring theme across many of these areas is a lack of meaningful monitoring and enforcement by regulatory authorities. For instance, scrutiny of listed companies in respect of corruption risk management remains questionable, and a system for verifying the accuracy of beneficial ownership information must be developed. There is an acknowledged lack of dissuasive administrative and/or criminal sanctions for violations of regulatory requirements regarding beneficial ownership information. Beyond this, there are no credible administrative, procedural or legal incentives for businesses to improve integrity practices.

Whilst there is increasing awareness of the need for robust internal anti-corruption controls at state-owned entities, application of these controls across the ten companies reviewed remains uneven. The majority of companies could not demonstrate how these went beyond the formal requirements imposed by legislation to be integrated into the decision-making processes of the company. A lack of established and independent supervisory boards and permanent, competitively-appointed CEOs across many of the entities raises concerns about political commitment to reform and undermines broader efforts to have a transparent and well-governed state sector. Audit practices have clearly improved, however, and public disclosure of key information by Ukraine's largest SOEs is increasing (though there is significant room for improvement).

Indicator 8.1. Boards of directors of listed companies/publicly traded companies are responsible for oversight of the management of corruption risks

Assessment of compliance

Benchmark 8.1.1.

Corporate Governance Code establishes the responsibility of boards of directors of listed companies to oversee the management of corruption risks as a part of integrated risk management

In March 2020,[87] the National Securities and Stock Market Commission (NSSMC) of Ukraine approved the "Corporate Governance Code: Key Requirements and Recommendations" (the Code),[88] drafted in cooperation with Ukrainian and international experts. In addition to summarizing the legal, regulatory and listing requirements that companies must follow, the Code identifies recommended best practices considered essential for good governance. The Code makes clear that a company's supervisory board should be responsible for overseeing the integrity of the control environment, including risk management and compliance. In a specific section devoted to anti-corruption and ethical standards (Section 6), the Code lists recommendations for the anti-corruption policy, including a clear statement that the Supervisory Board and the Executive Body: (i) must ensure the implementation of anti-corruption policies; and (ii) should monitor and evaluate the effectiveness of anti-corruption policies and, if necessary, propose remedial measures. Whilst the Code is primarily relevant to listed companies (or those considering a listing) under the supervision of the NSSMC, it is intended to be of broader relevance as a benchmark and reference point to unlisted companies and state-owned enterprises (SOEs) seeking to build and implement a robust integrated risk management system to manage, amongst other things, corruption risk.

As in many other jurisdictions, application of the Code is recommended rather than mandatory. However, as a soft law tool, there is an expectation by regulatory authorities that companies listed on, or seeking to enter, Ukraine's stock markets will comply with the Recommendations of the Code. Listed companies are required to explain how they implement the Recommendations of the Code in their annual corporate governance disclosures, and/or identify and explain any departures from it.

Benchmark 8.1.2.

Securities regulators or other relevant authorities regularly monitor how boards of directors of listed companies oversee the management of corruption risks

Outstanding in Ukraine: No evidence to demonstrate regular monitoring by authorities of how boards of directors of listed companies oversee the management of corruption risks

The NSSMC is responsible for monitoring stock market participants in accordance with the Law of Ukraine "On State Regulation of the Securities Market in Ukraine" and its own regulatory acts. The authorities

[87] National Securities and Stock Market Commission (13 March 2020), National Corporate Governance Code is approved.

[88] Ukrainian Corporate Governance Academy (1 January 2020), The Core Code of Corporate Governance.

explained that the NSSMC's monitoring addresses both formal (procedural) matters, such as timely submission of documents, and substantive issues, including implementation of regulatory requirements.

The monitoring team was provided with insufficient information to assess whether and how the NSSMC ensures in practice proper oversight over the management of corruption risks by the boards of listed companies. The authorities referred to the NSSMC annual reports for 2018 and 2019, which state that 11 and 9 companies were inspected in those years respectively, however, there is no indication or evidence to show these inspections related to board oversight of corruption risk management, and on what basis the inspections were made. The NSSMC annual report for 2020 has not yet been approved. Business community representatives were also unable to shed any light on these monitoring practices, suggesting either a lack of clear action or communication in this area on the part of the regulator.

In the additional responses, Ukraine stated that in the first year of operation of the Code, the NSSMC processed annual reports of joint stock companies, in particular, corporate governance reports and "no cases of improper explanation of the issuer on the reasons for deviations from the provisions of the Corporate Governance Code were identified." However, this does not appear plausible to the monitoring team, given about 3000 companies submitted reports and the lack of further evidence to explain who conducted these assessment and how.

Indicator 8.2. Public disclosure of beneficial ownership of all companies registered in the country is ensured

Background

Ukraine's commitment to transparency of beneficial ownership data is well known and laudable. In 2016, it was one of the first countries in the world to implement a public beneficial ownership register of the beneficial owners, and in 2017 committed to integrating its national register of beneficial ownership (i.e. the United State Register) with the 'OpenOwnership Register'; as a result, Ukraine's beneficial ownership data is automatically available via that platform, which provides and links beneficial ownership data from around the world. But concerns persist about the completeness of the United State Register (in terms of number/percentage of companies covered) and the quality, accuracy and reliability of information contained therein.

The new AML Law, The Law of Ukraine No. 361 "On Prevention and Counteraction to Legalisation (Laundering) of the Proceeds of Crime, Financing of Terrorism and Proliferation of Weapons of Mass Destruction", which entirely replaces the old anti-money laundering law, took effect on 28 April 2020. The 'New AML Law', amends certain legislative acts of Ukraine, including the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Organisations" and the Code of Administrative Offences of Ukraine, and introduced important updates regarding the disclosure and verification of UBOs in Ukraine, including: (i) changes to / expansion of UBO definition; (ii) new UBO disclosure requirements (on-going updates and annual confirmation); and (iii) increased liability for non-compliance (though see below re limited effect of this regime).

Importantly, the New AML law required legal entities registered before 28 April 2020 to submit information to a state registrar on their UBOs by October 2021; however, this deadline for the mandatory submission of information regarding ownership structures and ultimate beneficial owners of Ukrainian legal entities was recently extended by nine months (i.e., until 11 July 2022). Whilst this further delays implementation of the new AML Law (the Ministry of Finance only approved the form of ownership structure that the entities had to submit with the state registrar in June 2021 (Order No. 163)), the extension will give companies sufficient time to comply with the new UBO disclosure requirements (it had proved challenging in the

previous, compressed timeframe), and ensure state registers are able to properly manage companies compliance with the new disclosure requirements.

Assessment of compliance

Benchmark 8.2.1.

Information about beneficial owners is registered and publicly disclosed online in a central register

In Ukraine, self-declared information about beneficial owners is registered and publicly disclosed online in a central register. The information must include nature and extent (level, degree, share) of beneficial ownership (benefits, interests, influence). As of 2020, with a few very narrow exceptions all legal entities are obliged to maintain up-to-date information on the ultimate beneficial owners and ownership structure of the legal entity and to update such information on an ongoing and annual basis. Beneficial owner is defined as "any natural person exerting decisive influence (control) over the client's activities and/or over a natural person on whose behalf the financial transaction is conducted") (Item 30 Part 1 of Article 1 of Law No. 361).

This information is registered and publically disclosed online via the United State Register of Legal Entities, Individual Entrepreneurs and Public Organizations of Ukraine (the "United State Register"), an open and centralized online company register established, maintained and overseen by the Ministry of Justice (which is also responsible for issuing fines for non-compliance).

Benchmark 8.2.2.

Public disclosure of beneficial ownership information is ensured in machine-readable (open data), searchable format and free of charge

Beneficial ownership information in Ukraine is publically disclosed on the Unified State Register in machine-readable (open data) and searchable format. All information is accessible free of charge, apart from registration numbers of taxpayers' registration cards and passport numbers which is only accessible upon payment of a nominal fee (along with access to historical company information, including paper records).

Stakeholders positively assessed the launch of a new version of the United State Register in August 2020, which has significantly improved the structure and format of the information contained in the database, making verification easier. Nevertheless, several practical concerns have been raised by users, about ease of use, searchability in the free 'version' of the database and accuracy and completeness of data. Ukrainian authorities are working to further improve the user experience, for example by including the option to search the register by UBO.

Benchmark 8.2.3.

Beneficial ownership information is verified routinely by public authorities

Outstanding in Ukraine: No evidence to demonstrate that public authorities routinely conduct verification of the beneficial ownership information that is recorded in the central register.

Routine and meaningful verification of beneficial ownership information by public authorities is lacking in Ukraine. There is no designated authority to verify this information, nor is there any evidence to demonstrate that such verification is carried out in practice during registration of legal entities or afterwards, for example through random or risk-based verification. Registration of legal entities in Ukraine is carried out by the state registrars. Review of registration documentation is narrow and formalistic (i.e. is the proper documentation submitted), and does not require or oblige registrars to verify the accuracy of beneficial ownership information submitted by an applicant. There is no established process to cross-check other potentially relevant information sources, for example public procurement data, the asset declaration register or the register of property rights, to verify beneficial ownership data prior to allowing a legal entity to be registered. Information is entered into the United State Register solely on the basis of documents submitted by the applicant. These issues undermine the accuracy completeness and thus the effectiveness of the United State Register.

Stakeholders also noted a general reluctance on the part of any one agency to take ownership of introducing and overseeing implementation of an effective verification system.

A commitment to implement verification of beneficial information is contained in the Memorandum of Economic and Financial Policies signed by Ukraine and the IMF in June 2020, and Ukraine's progress in this area will be a key focus of future monitoring. To this end, the monitoring team positively notes the recent introduction to the Verkhovna Rada of draft Law No. 6003, on "Amendments to Some Laws of Ukraine on improving Mechanisms for Validation of Information on Final Beneficiary Owners and Ownership Structure of Legal Entities', which acknowledges and seeks to remedy some of these shortcomings. It is at a very early stage, however, and the Draft Law's features and progress will be studied more closely and addressed in the next monitoring report.

Benchmark 8.2.4.

Financial institutions, designated non-financial businesses and professions and other obligated entities under the anti-money laundering legislation have an obligation to identify and verify the beneficial ownership and report discrepancies

Law 361-IX "On Prevention and Counteraction to Legalization (Laundering) of Proceeds from Crime, Financing of Terrorism and Financing of the Proliferation of Weapons of Mass Destruction" requires that primary financial monitoring entities (also referred to as subjects of primary financial monitoring), including banks, financial institutions, designated non-financial businesses and certain professions such as lawyers and tax advisors, identify and verify beneficial ownership information of clients (Article 1, Article 6(2), Article 11). Law 361-IX makes it clear that primary financial monitoring entities should not rely solely on this database but also use separate and independent sources and documents to confirm beneficial ownership (Article 11). Pursuant to Article 8.2(2), primary financial monitoring entities are obligated to report to the "special authorized authority" any discrepancies between the information on UBOs disclosed in United

State Register and information received during the client/customer due diligence process no later than the tenth business day of the month following the month in which discrepancies were detected (Article 8.2(8)(d)). The "specially authorized authority" for these purposes is the State Financial Monitoring Service of Ukraine (SFMS), performing the functions of the Financial Intelligence Unit (Law 361-IX, Article 1.1(55), Cabinet of Ministers Regulation 537 of 2015).

Primary financial monitoring entities should provide information on discrepancies identified between a client's ultimate beneficial owners to the SFMS via an e-portal. The procedures for doing so – and the requirements for format, structure and content of messages filed by subjects of primary financial monitoring, as well as directories for their filling and guidelines for interaction between subjects of primary financial monitoring and the SFMS – are set out in Cabinet of Ministers Regulation 850 of 2020, NBU Decree No. 107 of 2020 and Ministry of Finance Order No. 322 of 2021.

Benchmark 8.2.5.

Dissuasive administrative and criminal sanctions are applied routinely for violations of regulations on registration and disclosure of beneficial ownership

Outstanding in Ukraine: No evidence to demonstrate that available administrative and criminal sanctions are dissuasive and applied routinely in practice.

Failure to disclose, or disclose in a timely manner, beneficial ownership information or documentation evidencing such information is an administrative offence (Art. 166[11] of the COA) but the sanction range of the fine is not dissuasive (UAH 17,000 to UAH 51,000). The legislation provides that the subject of this violation is the head of the legal entity or a person entitled to act on behalf of the legal entity. In addition to administrative liability, Article 205-1 of the Criminal Code of Ukraine establishes criminal liability for entering into documents submitted for state registration of a legal entity or individual entrepreneur, knowingly false information, as well as intentional submission of documents containing knowingly false information.

However, it was conceded by Ukraine that these sanctions are seldom applied, and not in a manner that would deter violations of the rules on registration and disclosure of information on the ultimate beneficial owners. In 2020, only 6 cases were progressed under Art. 166 of the COA, and only 3 went to court. None resulted in administrative penalties being imposed. In 2019, there were 7 cases, 3 of which were considered by the courts. None resulted in the imposition of penalties. More cases were brought under the criminal provisions in 2020 (621 were considered by courts, with 88 people imprisoned, fined or sentenced to probation), however these figures are misleading as Article 205-1of the Criminal Code applies to a much broader category of offences than registration of beneficial ownership information – and the figures are not broken down to this sub-level.

There is, however, an acceptance that this lack of routine application of sanctions was acknowledged by Ukrainian authorities as an area for improvement, and efforts are purportedly under way to increase their scope and effectiveness (though more information was not given as to whether this would take the form of increased prosecution of cases under existing provisions, or whether a revision to these was necessary).

Indicator 8.3. There are incentives for all types of companies to improve integrity of their operations

Assessment of compliance

Benchmark 8.3.1.

Government has implemented incentives for companies to improve the integrity of and prevent corruption in their operations.

Outstanding in Ukraine: No evidence of implementation in practice by the state authorities of incentives for companies to improve the integrity of and prevent corruption in their operations.

The Government has not yet implemented meaningful incentives for companies to improve the integrity and prevent corruption in their operations.

Ukraine referred to a requirement in the PPL that only legal entities with: (a) an anti-corruption programme; and (b) a commissioner for the implementation of anti-corruption programme, may participate in public procurement for amounts above UAH 20 million (Art. 17, para. 1(10)). More specifically, companies participating in public tenders are obliged to have adopted their own anti-corruption programmes based on the model anti-corruption programme developed by the NACP. However, in practice these requirements appear to be a formal box-ticking exercise rather than a substantive and concerted effort to raise the bar in business integrity standards, a view shared by stakeholders. The NACP does not assess the quality or implementation of such programmes, nor does it have any overarching role in monitoring or assisting procuring entities with this assessment, or excluding tender participants who do not meet this requirement; rather, these responsibilities fall to the individual entities running public tenders. As such, it is impossible to ascertain how rigorously these checks are carried out across the state sector. Likewise, while two state entities gave examples of companies excluded from tenders in recent years for failing to meet this requirement, evidence was not presented to demonstrate that this is the norm. The Government noted that the State Audit Service and Anti-Monopoly Committee of Ukraine both play a role in this area, the former by monitoring procurement contracts and the latter through considering appeals of procurement participants. Both entities considered thousands of monitoring and reviews in 2020. However, no information was provided as to how compliance matters (and more specifically the robustness of anti-corruption systems in tenderers) were considered and assisted by these processes.

The monitoring team also notes that the threshold for these rules to even apply is relatively high (UAH 20m, or approx. EUR 700,000), meaning that many tenders for significant sums proceed without any business integrity / anti-corruption requirements.

The draft Anti-Corruption Strategy 2021-2025, currently being prepared by Ukraine, will purportedly include amendments to legislation to introduce incentives for businesses to improve integrity and corruption prevention, a development encouraged by stakeholders. One initiative being pushed by the Ukrainian Network of Integrity and Compliance (UNIC), its members and local Ukrainian lawyers is for the introduction in Ukraine of corporate criminal liability, deferred prosecution agreements (or DPAs) and compliance monitorships. This is already the subject of discussions with the business community and NACP. Such a move would require considerable adjustments and improvements to Ukraine's legislative and criminal justice landscape, would require cooperation of law enforcement authorities, and likely require (significant) additional resources for the NACP – the regulatory entity most suitable to appointing and overseeing the

monitors. The concept is still being refined, however, and draft legislation will not be proposed until autumn 2021 (at the earliest).

The monitoring team welcomes the joint work of UNIC and the NAPC on this initiative and will follow its development with interest. If adopted, legally enshrined anti-bribery and corruption compliance obligations on private sector entities would be positive evidence of the Government's commitment to creating concrete and measurable incentives for companies to improve their business integrity practices, could work to stimulate the strengthening of existing compliance systems, and act as an impetus for the broader embrace of compliance culture in Ukraine.

Indicator 8.4. There are mechanisms to address concerns of all companies related to corruption and bribe solicitation by public officials

Assessment of compliance

Benchmark 8.4.1.

There is a designated institution responsible for receiving complaints from companies about bribe solicitation by public officials and related corruption-related matters, providing protection or helping businesses to resolve legitimate concerns

The Business Ombudsman Council (BOC) is an independent advisory body established in 2014 with the participation and support of national and international partners.[89]

The BOC has two main functions. The first is to review, investigate and resolve business complaints against government agencies, local self-government bodies, state enterprises, and their officials and the second is to propose systemic solutions to the most common problems encountered by Ukrainian businesses (see benchmarks 8.4.4 and 8.4.5). In performing these functions, the BOC both receives complaints from companies about bribe solicitation by public officials and related corruption-related matters and helps businesses to resolve legitimate concerns.

In 2020, the BOC received 1737 complaints, resolved / closed 1159 of those, and 89% of individual (i.e. case by case) recommendations the BOC issued to state bodies are already implemented by relevant state agencies. The BOC's actions in 2020 alone helped companies to recover around UAH 843 million.[90] As of 8 June 2021, the BOC has received 9,094 complaints, of which 6,048 have been closed, 2694 have been dismissed, 285 remain under investigation, and 67 are in preliminary assessment. Since the beginning of its operations, 88% of the BOC's individual recommendations have been implemented.[91]

[89] Implementing the Memorandum of Understanding for the Ukrainian Anti-Corruption Initiative dated May 12, 2014, concluded among the Government of Ukraine, EBRD, OECD, and five largest Ukrainian business associations.

[90] Business Ombudsmen Council (2021), Quarterly Report, 1 October – 31 December 2020.

[91] Business Ombudsmen Council (2021), Received complaints, Dynamics 2015 – 2020.

Benchmark 8.4.2.

There is a wide perception among the main stakeholders that the institution operates independently and impartially without political or other undue interference in its work

The BOC receives widespread positive feedback from stakeholders / the business community, who have noted, amongst other things, the professionalism and unprejudiced nature of the Business Ombudsman Council's activities. Furthermore, discussions during the visit confirmed that the BOC is widely perceived to be operating independently and impartially and to be free from political or other undue influence in its work (which is the BOC's own view, as well). It is clear the business community trusts and relies on the BOC.

Stakeholders referred to BOC as an independent and impartial institution to which corruption complaints/cases may be referred without fear of prosecution or other unfavourable consequences, to receive protection, and to resolve legitimate concerns. The BOC has been widely hailed as a powerful and effective mechanism through which companies may report corruption and seek protection of their legitimate rights.

There is a near-unanimous satisfaction of complainants with the BOC's services: in 2020, 98% of applicants who gave their feedback were satisfied with their cooperation with the BOC (and 97% and 98% in Q1 and Q2 2021 respectively).[92]

Benchmark 8.4.3.

This institution has powers and resources that are sufficient to review individual complaints, to provide protection and help businesses resolve their concerns in another legal way

The BOC has broad powers to enable it to review individual complaints, conduct administrative investigations, and to provide protection and other help to businesses to resolve their concerns. The BOC has a right: (i) to submit requests and receive without unreasonable delays from authorities documents and other information necessary or useful for processing and resolving complaints (including conducting interviews); (ii) to bring to the notice of the relevant authorities cases that may indicate a violation of the legitimate interests of business entities; (iii) to apply for the taking of measures to eliminate violations and to bring the perpetrators to justice; (iv) to receive timely answers from the relevant authorities in writing with a detailed explanation of the status of consideration and measures taken to address issues raised by the BOC; and (v) to involve, with their consent, government officials, citizens, enterprises, institutions and organizations to consider issues related to their powers (Article 6 of the Regulation on the Business Ombudsman).

The BOC is well-staffed and well-funded, and statistics show that these resources allow it to investigate and close cases in a timely fashion. For instance, the average duration of investigations in Q1 2021 was 84 days, six days less than the standard timeframe envisaged in the BOC's Rules of Procedure (90 days).

[92] Business Ombudsmen Council (2021), Quarterly Report, 1 January – 31 March 2021; Business Ombudsmen Council (2021), Quarterly Report, 1 April – 30 June 2021.

This figure was 77 days in Q4 2020 and 74 days in Q1 2020. This was echoed by stakeholders at the visit, who confirmed the responsiveness of the BOC's team and absence of ungrounded delays in its work.

Whilst it is clear that the BOC has sufficient legal, financial and personnel to effectively implement its mandate, it was noted by the BOC itself and stakeholders that the Draft Law on the Business Council Ombudsman, currently before the Verkhovna Rada, would materially improve its operational effectiveness and increase the BOC's institutional sustainability. In addition to providing a legislative basis for the institution, the Draft Law seeks the further expansion and codification of BOC's powers for its effective operation, including by, amongst other things, introducing mechanisms for implementing systemic recommendations, establishing a procedure for complaints review at the legislative level, regulating the obligation for state authorities to cooperate with the BOC, and providing for the possibility for new business associations to join the BOC's supervisory board. Adoption of the Draft Law is encouraged by stakeholders, as well as by the monitoring team, which notes that the creation of a legal basis for the BOC was a key recommendation of the 4th Round Monitoring Report.

Finally, it has been noted that discussions continue between the BOC, government and other stakeholders in respect of financing of the BOC post-adoption of the Draft Law. The separation of its current financing source from the state – the Ukraine Stabilisation and Sustainable Growth Multi-Donor Account managed by the EBRD – is a significant reason for the (perception of) impartiality and independence on the part of the BOC, and it is hoped that future financing arrangements will not undermine this position.

Benchmark 8.4.4.

This or another institution analyses systemic problems and prepares policy recommendations to the government

The BOC routinely prepares and publishes comprehensive reports that address the most pressing systemic issues that negatively affect businesses and the investment climate and proposes practical ways to address them. These systemic reports include recommendations for the government in general and/or specific state/municipal bodies. In its six years of operation, the BOC has prepared 17 systemic reports on selected business problems and issued over 400 recommendations to state bodies. Both the reports and recommendations are available on the BOC's website.[93]

Stakeholders acknowledged the important role the BOC plays in identifying, analysing and proposing recommendations to address systemic issues affecting Ukrainian businesses.

During the visit, it became apparent that although the BOC works collaboratively and effectively with government in preparing its reports, there is no standard procedure or official channel for it to submit the final reports and recommendations to the government. Rather, each submission is an ad hoc process requiring explanation by the BOC to various State branches about the importance of substantive consideration of the recommendations. The monitoring team would encourage Ukraine to create such a channel to enhance this co-operation and, to this end, notes that the Draft Law on the Business Council Ombudsman is seeking to formalise the right to present findings and systemic recommendations at the

[93] Business Ombudsmen Council (2021), Systemic Reports; Business Ombudsmen Council (2021), The Business Ombudsman Council provides recommendations to state bodies on the basis of individual cases and in accordance with published systemic reports. Here we have collected information on the implementation status of systemic recommendations only.

meetings of the Cabinet of ministers, Verkhovna Rada, and Verkhovna Rada Committees. It is hoped that this remains in the final version of the Law.

Benchmark 8.4.5.

At least half of policy recommendations regarding systemic problems related to business concerns about corruption, bribe solicitation and related matters have been implemented or otherwise properly addressed by the government

According to the information provided by the BOC, in 2020 the BOC made 90 recommendations pertaining to systemic problems related to business concerns about corruption, bribe solicitation and related matters. Of these, 13 (14%) have been implemented, 68 (76%) are in the process of implementation, and 9 (10%) have not been implemented. Stakeholders noted during the visit that these systemic recommendations (leading to implementation of changes by government agencies) were a valuable and effective BOC instrument.

Box 8.1. Ukraine's Business Ombudsman Council (BOC)

The BOC of Ukraine is an independent institution established in 2014 by a Memorandum of Understanding between the Cabinet of Ministers, the European Bank for Reconstruction and Development, the OECD and five important business associations. A key factor in its independence is the fact that the Business Ombudsman is selected by the institution's Supervisory Board, comprised of representatives of the BOC's founding organisations.

The BOC is empowered to receive complaints of, and investigate alleged wrongdoing by, state entities. If abuse or wrongdoing is established, the BOC brings them to the attention of the relevant authorities and will follow up on cases until they care completed. The average time to process a complaint is just under three months (79 days in Q2, 2021). In 2020, the BOC investigated 1,737 complaints, and resolved 1,159 of them. The majority of complaints (64%) concerned tax issues. In 2020, the BOC helped companies to return UAH 843 million of unjustified financial claims from state bodies.

In addition to helping individual companies, the BOC prepares systemic reports addressing the most common and pressing issues that negatively affect businesses in Ukraine and the investment climate more generally, and proposes practical recommendations to address these. So far, the BOC has prepared 17 reports on issues relating to taxation, state customs, illegal use of law-enforcement against companies, and land use. These reports are presented to the relevant state bodies for follow up, as well as to the Prime Minister of Ukraine.

In its 7 years of operation, the BOC has come to be viewed as an efficient and independent institution to which businesses can reliably turn to for help when their legitimate interests are impinged by the state. The BOC's systemic recommendations provide important impetus for systemic changes that will improve Ukraine's investment climate.

Indicator 8.5. State fulfils its role of an active and informed owner of SOEs and ensures the integrity of their governance structure and operations

Background

A recent OECD Review of the Corporate Governance of State-Owned Enterprises found that: while the compliance framework has been developed and measures are partly implemented, the effectiveness of anti-corruption programmes is questionable. The NACP lacks the resources, capacity and mandate to monitor implementation of anti-corruption programmes across the entire SOE portfolio. There is also a lack of clarity regarding whether ownership entities are involved in ensuring the effectiveness of anti-corruption programmes, and assessing their alignment with the state's expectations with regard to integrity and anti-corruption. Moreover, as the CEO appoints the commissioner of the anti-corruption programme, there may be conflicts of interest in monitoring and detecting corruption at management levels. It should be noted that only a handful of SOEs (mostly among the top-15) in Ukraine have developed risk management systems which include a coherent and comprehensive set of internal controls, ethics and compliance measures. These also include mechanisms to combat corruption within the SOEs and to protect whistleblowers. Despite their existence in certain SOEs, internal controls, as well as ethics and compliance programmes, may not be properly functional. Furthermore, strong and responsible state ownership is essential to effectively mitigate these risks.[94]

The monitoring team is aligned with these conclusions, as reflected below under the assessment of compliance with the benchmarks.

For the purposes of this Pilot Monitoring, the Ministry for Development of Economy, Trade and Agriculture of Ukraine identified the following entities as being the "10 largest SOEs" in the country: State Concern "Ukroboronprom" (Ukroboronprom); State Enterprise "National Nuclear Energy Generating Company "Energoatom" (Energoatom); Joint-Stock Company "National Joint-Stock Company "Naftogaz of Ukraine" (Naftogaz); Private Joint Stock Company "National Energy Company "Ukrenergo" (Ukrenergo); Private Joint Stock Company "Ukrhidroenergo" (Ukrhidroenergo); State Enterprise "Boryspil International Airport" (Boryspil); State Enterprise "Administration of Seaports of Ukraine" (Administration of Seaports of Ukraine); Joint-Stock Company "Ukrainian Railways" (Ukrzaliznytsia); Joint Stock Company "Ukrposhta" (Ukrposhta); Public Joint-Stock Company "State Food and Grain Corporation of Ukraine" (SFGCU). All of these SOEs must meet the requirements of benchmarks under this indicator.

[94] OECD (2021), OECD Review of the Corporate Governance of State-Owned Enterprises: Ukraine, pp.190-191.

Assessment of compliance

Benchmark 8.5.1.

Government ensures that supervisory boards in at least 10 largest SOEs are established through a merit-based and transparent nomination process, including a minimum one-third of independent members

Outstanding in Ukraine: Independent supervisory boards not established at certain entities and insufficient evidence to show that members of those in place were selected through a merit-based and transparent nomination process

Six of the ten largest SOEs have supervisory boards in place with at least one third of independent members: Ukrenergo, Ukrzaliznytsia, Ukrposhta, Ukrhidroenergo, Boryspil, and Administration of Sea Ports of Ukraine (ASPU). As at the end of September 2021, the Government of Ukraine had announced that it would perform the functions of the Naftogaz Supervisory Board until the appointment of a new Board (following the resignation of the previous board – see Benchmark 8.5.3 below). Supervisory boards have not been established at SFGCU or Energoatom. Ukroboronprom has a supervisory board, but its five members are appointed by the State.

There are Cabinet of Ministers-approved procedures in place governing the selection of members of supervisory boards for state-owned enterprises (revised in 2018), including requirements designed to make the processes transparent, competitive and merit-based, but in practice these are not applied evenly. The information provided by Ukraine shows that certain of the nomination processes to these supervisory boards appear to have been in line with these requirements, for instance the online publication of job requirements, a competitive number of national and international applicants, and involvement of external executive recruitment advisors, (e.g. Ukrposhta, Ukrenergo, Ukrzaliznytsia, ASPU, Ukrhidroenergo and Boryspil), though it is unclear how the Nomination Committee ultimately selected successful applicants (and whether this was merit-based).

Benchmark 8.5.2.

Boards of at least 10 largest SOEs established integrated risk management systems that include internal controls, ethics and compliance measures that address SOE integrity and prevention of corruption

Outstanding in Ukraine: Insufficient evidence to establish that all 10 SOEs have developed integrated risk management systems, overseen by the board, which include a system of internal controls, ethics and compliance measures that are implemented in practice.

The depth and quality of internal controls addressing ethics, business integrity and anti-corruption risks as well as the degree to which these are operationally integrated in company risk management systems vary across the ten largest SOEs. Whilst all entities have adopted the model anti-corruption programme formulated by the NACP, insufficient information was generally provided to show that these programmes had been effectively tailored to an entity's specific circumstances. This suggests a largely formalistic approach, unlikely to actually and effectively promote business ethics and integrity and prevent and detect corrupt acts on the part of entities and employees. While stakeholders noted during the visit that the

government was increasingly aware of the need for state companies to implement robust anti-bribery and corruption compliance controls, and that this was a key topic in interactions with international partners, stakeholders generally believed the impact of current anti-corruption programmes controls current practical impact on limiting / eliminating corruption to be minimal. No information was provided in respect of steps the authorities might take to bolster the effectiveness of these controls. The monitoring team positively notes the work that non-governmental organisations and various other local and international partners are now doing with selected state entities to assist them to enhance the effectiveness of these controls. Similarly, it is important that the authorities responsible for implementing anti-corruption policy also create conditions for state-owned enterprises to receive systematic training on the development and implementation of anti-corruption programmes, compliance and corporate integrity in general. Enhanced co-operation between SOEs and collective action initiatives such as UNIC to develop and roll out tools (e.g. anti-corruption compliance diagnostics, compliance system roadmap, qualitative risk assessment guide) would also help companies to more quickly and effectively strengthen compliance systems and integrate them into broader risk management systems.

Only in six of the ten entities does the company's board appear to have ultimate responsibility for overseeing the effective implementation of internal ethics and anti-bribery and corruption controls. Statutorily required anti-corruption officers (or commissioners) responsible for anti-corruption programmes are in place at all ten entities. However, by and large it was not explained how these individuals were recruited / appointed (for instance through a competitive selection procedure), their qualifications and compensation packages, their responsibilities, the resources allocated to them to perform their duties, or how their visibility and functional independence is ensured and maintained vis-à-vis the chief executives who are responsible for appointing and dismissing them. The latter point, and the conflict of interest risks it raises, is of particular concern.

Seven of the ten entities have standalone codes of conduct, ethics and/or anti-corruption policies in place (Ukrposhta and ASPU are currently implementing these, while SFGCU's plans to do so are unclear). However, it is only in the case of Naftogaz and Ukrenergo, which have both benefited from significant government and international support that a coherent and comprehensive set of internal controls, ethics and compliance measures seem to effectively sit within a broader risk management system. Noting that efforts to replicate this at Ukrzaliznytsia appear to be underway, and that information provided late in the process by Ukrhidroenergo suggests it too is making concerted efforts in this respect, the monitoring team was not presented with evidence of comprehensive ethics and anti-corruption compliance programmes in place at other entities that promote business integrity and which are practically and effectively integrated into the company's business processes. This conclusion reflects stakeholder comments in response to the questionnaire and during the visit.

Risk assessments are not used broadly or consistently across the ten largest SOEs, and these entities generally failed to provide evidence to demonstrate how findings were considered and addressed, including whether they resulted in any changes to internal controls or operational practice. Whether and how these anti-corruption programmes / compliance functions are effectively extended to regional offices, decentralised functions and/or subsidiaries is also largely unclear. Similarly, while vague references were made to training regimes covering business integrity / anti-corruption matters, no evidence was provided to show how this was done, how regularly, and who was targeted (Ukrhidroenergo was an exception, providing information late in the process to describe its training programme in recent years). No other information was provided in respect of awareness raising measures, such as internal campaigns promoting new compliance policies or messages / communications from senior management about the importance of business integrity. A simple proxy measure of whether an ethics and anti-corruption programme is working in practice is to consider whether employees are sanctioned or removed from their positions for failing to comply with internal ethics and/or anti-corruption policies. Ukrzaliznytsia, Ukrenergo, Ukrhidroenergo, Energoatom and Ukrposhta provided data showing a handful of employees were

disciplined or removed in the period 2019-2021, with the remainder of entities either not keeping or providing this information or maintaining that no incidents were identified. Considering the scale of these entities and the corruption risks they face, these numbers might be expected to be much higher.

Benchmark 8.5.3.

CEOs of at least 10 largest SOEs are appointed through a merit-based and transparent nomination process and report to the boards

Outstanding in Ukraine: Insufficient evidence to establish that CEOs of all 10 SOEs were selected and appointed in practice through a merit based and transparent nomination process, and reported to their boards on regular and ad hoc basis

There is little legal and practical consistency across the SOEs for which Ukraine provided information in terms of how chief executives were appointed, and to whom and how frequently they report. The lack of permanent, competitively selected CEOs raises doubts about government commitment to genuinely reform the state sector and undermines the efforts to advance anti-corruption and business integrity practices at SOEs, which depend on strong and stable corporate governance. Stakeholders echoed these concerns, and added that the dismissal of Naftogaz's CEO by the Cabinet of Ministers in April 2021 and appointment of his replacement (which was challenged by the NACP) had fed the perception that whilst formal procedures might be in place to govern hiring and firing of executives, in practice these may be overridden by governmental discretion. They called for more predictable, sustainable and transparent processes for selecting and changing management. The monitoring team would add its voice to these calls.

Permanent chief executives have not been appointed at Energoatom, Boryspil, USPA, SFGCU or Ukrzaliznytsia. Various individuals are acting in these roles pending a permanent appointment. In respect of the SOEs that do have permanent chief executives (or a 'general director', in the case of some), i.e. Ukrenergo, Ukrposhta, Ukrhidroenergo, Ukroboronprom and Naftogaz, almost all of the processes to select them were flawed, and not merit-based and transparent (Ukrposhta being the exception). In 2014, the Cabinet of Ministers appointed the CEO of Naftogaz. The CEO was re-appointed in 2020 without a competitive selection procedure, though upon nomination by the supervisory board. In April 2021, the Cabinet of Ministers dismissed the CEO and the supervisory board, citing unsatisfactory performance due to significant losses faced by Naftogaz in 2020 as a key reason. While the same supervisory board members were re-appointed within two days after their dismissal, the Cabinet of Ministers appointed a new CEO (former acting Minister of Energy) while their powers were suspended.

The competitive search for a CEO of ASPU was called off in April 2020, ostensibly due to COVID-19, and a candidate appointed on the recommendation of the Cabinet of Ministers. Whilst a competitive search for a chief executive at Ukrenergo was launched in early 2020, the Cabinet of Ministers suspended the process and an acting CEO appointed, who was made permanent by the supervisory board in August 2020. The General Director of Ukrhidroenergo was re-appointed in an ad hoc process in 2019 by the company's supervisory board for another 5-year term (even though he still had 3 years remaining on his then-current term). The General Director of Ukroboronprom was appointed by the President of Ukraine on the proposal of the Cabinet of Ministers in December 2020.

With limited exceptions, no evidence was provided by the entities to demonstrate that their CEOs, permanent or acting, in fact report to the supervisory boards (where appointed) on a regular and ad hoc basis (Ukrhidroenergo provided this information late in the process, whilst Ukrposhta also explained this to be the case).

Benchmark 8.5.4.

At least 10 largest SOEs conduct annual external audits in line with international accounting standards

Outstanding in Ukraine: External audit in line with international accounting standards not provided for Ukroboronprom, though this work is underway

The monitoring team notes that this is clearly an area that has been prioritised by authorities and company leadership in recent years, and good progress was made. Stakeholders share this view. In 2020, IFRS audits conducted by independent external auditors were completed in respect of Energoatom, Naftogaz, Ukrenergo, Ukrzaliznytsia, Ukrhidroenergo, Boryspil, ASPU, SFGCU and Ukrposhta, all of which are published on the respective websites of these companies. Ukroboronprom is in the process of bringing its historical external audit record 'up to date' (starting with 2018); its 2019 IFRS audit was approved by the supervisory board and posted on its website in September 2021, and it's 2020 audit is currently being prepared by the company.

Benchmark 8.5.5.

The boards of 10 largest SOEs routinely deliberate about and decide on the findings of internal audit committees and external audit reports regarding integrity issues

Outstanding in Ukraine: Insufficient evidence provided to shows that boards of the 10 SOEs routinely review external and internal audit reports and take decisions regarding integrity issues in the company's operation

The 10 largest entities uniformly failed to establish by reference to documentary evidence that their supervisory boards routinely review external and internal audit reports and take decisions regarding integrity issues in the company's operation. No further information was provided during the visit.

However, the monitoring team notes that unreferenced written information suggested that the boards of at least Naftogaz, Ukrhidroenergo, Ukrenergo and Boryspil do in fact meet regularly (on both a scheduled and ad hoc basis) to discuss the conclusions of internal and external audits and relevant integrity issues. Some limited evidentiary materials by Administration of Seaports of Ukraine suggests that the board there similarly performs this function. The extent to which other boards do or do not do this is unclear. Stakeholders, however, considered that boards of many SOEs do consider these issues.

Benchmark 8.5.6.

10 largest SOEs disclose at least:

- company objectives and activities carried out in the public interest;
- financial and operating results;
- material transactions with other entities;
- remuneration of board members and key executives.

Outstanding in Ukraine: Insufficient explanation of whether all material transactions disclosed by all entities and failure to disclose actual amount of remuneration of each executive board member and of each key executive across almost all of the 10 entities

A substantial amount of listed information is publically disclosed on the websites of the ten entities (though it can sometimes be difficult to find, even when directed). It is only in the area of management and executive remuneration and material transactions where the entities collectively fall down in their disclosure. This assessment of generally good disclosure undermined by a lack of transparency in key areas (particularly board / management remuneration) was echoed by stakeholders.

All companies provide information about their objectives and activities carried out in the public interest (though there is a spectrum of how detailed the information provided by the companies is). Likewise, all entities provide financial and operating results either as separate documents or within publically disclosed annual reports (as in the case of Ukroboronprom).

The majority of entities publish public procurement records (from ProZorro) on their websites, though it was not explained to the monitoring team whether this was the full extent of material transactions for those entities (though at least in the case of Ukrhidroenergo it was represented that this was the case).

Transparency of board and executive pay at state entities is generally poor in Ukraine. Some stakeholders explained the reluctance to provide this information as stemming from an acute sensitivity around publishing details of often relatively high salaries in a country where average wages remain low. Only three entities of the implemented some aspect of the benchmark. Ukrenergo discloses the size of the remuneration for individual board members (but not executives). Ukrhidroenergo discloses board member remuneration and that of its executive body (which comprises only its General Director). Naftogaz disclosed the size of the remuneration for individual executives (in 2019) though it did not in 2020, a move which has been the subject of some criticism.

No other entities disclose individual management or board member remuneration figures, though some provide globalised figures and/or release remuneration reports without figures to show how salaries were determined. To this end, the monitoring team positively notes the introduction of Draft Law No. 3952 “On Amendments to Certain Legislative Acts to Ensure Openness of Information on the Amount of Remuneration in State-Owned Companies”, introduced to the Verkhovna Rada in September 2021, which seeks to ensure greater openness and access to information about the remuneration and other benefits of managers and other officials of state enterprises and companies. The content and progress of this Draft Law will be watched closely and considered in the next Monitoring Report.

9 Enforcement of Corruption Offences

Indicator 9.1. Liability for corruption offences is effectively enforced

Background

Previous monitoring rounds under IAP analysed criminalisation of corruption extensively. The 4th round report concluded that the criminal law provisions were in line with international standards except of those on statute of limitations (see below). There have not been substantial changes in the criminal offences, other than illicit enrichment which was first declared unconstitutional and then reinstated in the Criminal Code of Ukraine (Art. 368.2 and 368.5 of the CC). The money laundering offence was also amended and now foresees responsibility independently of the predicate offences (Art. 209 of the CC) which is a positive development.

For the purposes of the pilot report, "corruption offences" are defined as "criminal offences mentioned in Chapter III of the United Nations Convention against Corruption, namely bribery of national public officials, bribery of foreign public officials and officials of international public organizations, embezzlement, misappropriation or other diversion of property by a public official, trading in influence, abuse of functions by a public official, illicit enrichment, bribery in the private sector, embezzlement of property in the private sector, laundering of proceeds of crime." Criminal Code of Ukraine has a category of "corruption offences" (Art. 45 of the Criminal Code (CC) that is broader than the OECD/ACN definition.

Benchmark 9.1.1. – 9.1.8.

BENCHMARK	UKRAINE 2020	
	Total	Per 1 million of population
9.1.1. Track record of enforcement of active and passive bribery offences in the public sector with final convictions	679	15,43
9.1.2. Track record of enforcement of active and passive bribery offences in the private sector with final convictions	30	0,68
9.1.3. Track record of enforcement of offence of offering or promising of a bribe, bribe solicitation or acceptance of offer/promise of a bribe with final convictions	N/A	N/A
9.1.4. Track record of enforcement of bribery offences with intangible and non-pecuniary undue advantage with final convictions	N/A	N/A
9.1.5. Track record of enforcement of trading influence offence with final convictions	76	1,74
9.1.6. Track record of enforcement of illicit enrichment offence with final convictions or a track record of cases of non-criminal confiscation of unexplained wealth	0	0
9.1.7. Track record of enforcement of foreign bribery offence with final convictions	0	0
9.1.8. Track record of enforcement of money laundering sanctioned independently of the predicate public sector corruption offence with final convictions	12	0.27

Indicator 9.2. Proportionate and dissuasive sanctions for corruption are applied in practice

Background

In 2013-2014, Ukraine significantly increased sanctions for corruption offences. In particular, the sanction of deprivation of liberty was included in all basic (non-aggravated) offences as an optional sanction, which made these offences extraditable. In addition, the Parliament increased fines and introduced special confiscation. Also, importantly, the sanctions for offering and promising a bribe (as well as for the acceptance of the offer or promise or requesting an unlawful benefit) were matched with the sanctions for giving and receiving an unlawful benefit in compliance with international standards.

Previous IAP reports noted that the courts often release perpetrators of corruption on probation, apply sanctions below the minimum punishment provided by the specific offence or release convicted persons after they serve a short period of imprisonment, or even impose other sanctions instead of imprisonment.

Only about a quarter of the corruption cases detected by law enforcement result in an indictment and only very few of those resulted in a conviction with imprisonment terms to be served in a facility.

Assessment of compliance

Benchmark 9.2.1

Proportionate and dissuasive sanctions are routinely applied for corruption crimes

This benchmark requires that proportionate and dissuasive sanctions are routinely applied in practice. While the sanctions set in the law are proportionate and dissuasive, their practical application raises similar concerns as in the previous rounds of monitoring. According to the answers to the questionnaire, criminal liability for corruption offences as of 2019 had been ineffective. Before the launch of the High Anti-Corruption Court (HACC), an extremely low number of cases resulted in final convictions out of those sent to court. As explained during the visit, the reasons for this are multiple. Firstly, it takes a lot of time for the courts to hear cases and render final judgements. Secondly, around 18% of cases, including high-profile cases, are terminated annually because of the expiry of the statute of limitation and lastly, in over 95% of cases the applied sanctions are fines, only 2.5% of convicts have been sentenced with the "real" time in the facility in 2020.

Indeed, the statistics for 2020 show a low level of application of imprisonment and routine application of fines. For example, in 2020 out of 909 convictions (data does not include HACC judgements), 733 fines were imposed, 47 persons were imprisoned, 22 were restricted of liberty, 8 were arrested and 3 were banned from public office. In 2020, general courts imposed imprisonment (to be served in a facility) on 22 persons ranging from 3-5 years. Moreover, not all convicts receive the additional sanction ban from public office. Stakeholders agree that applied sanctions for corruption offences are not proportionate and dissuasive in Ukraine.

The practice is different in the newly launched High Anti-Corruption Court (HACC), where sentences are dissuasive and proportionate. Out of 20 convictions rendered by the HAAC 13 individuals were punished by "real terms" (time in penitentiary establishment) of imprisonment, 9 of these for 3-5 years of imprisonment and 3 persons, for 5-10 years.

Benchmark 9.2.2.

At least 50% of punishments for aggravated bribery offences in the public sector provided for imprisonment without conditional or another type of release

In 2020, 11 persons have been convicted of aggravated bribery offences (active bribery Art. 368.3-4 of the CC and Art. 369.3-4 of the CC), 9 of the convicts have been imprisoned without conditional or another type of release which accounts for 82%. In total in 2020, 598 persons have been convicted for active bribery (Art. 369) and 81 for passive bribery (Art. 368). Please note that these statistics do not include the convictions by HACC. In 2020, 3 persons have been convicted of aggravated bribery offences (active bribery Art. 368 pp. 3 - 4 of the CC and Art. 369 pp.3 – 4 of the CC), one of the convicts was imprisoned without conditional or another type of release.

Benchmark 9.2.3.

Public officials convicted of a corruption crime are dismissed from public office in all cases

According to the authorities, if a public official is convicted of an intentional offence they should be dismissed from the office without any additional proceedings, this includes all corruption offences as they are intentional crimes. Dismissal is not automatic and the decision is taken by the state body where the convicted individual worked. Relevant provisions are dispersed in various laws for different categories of officials. For example, Article 84.4 of the Civil Service Law applies to civil servants. Articles 12 and 20 of the Law of Ukraine on Service in Local Self-Government Bodies applies to local self-government.

The NACP maintains a unified register of individuals that have been convicted for corruption, entering names in the registry and monitoring that such individuals have been dismissed. If the NACP finds that the individual has not been dismissed, it issues an instruction to the entity requiring the dismissal within 10 days.

In addition, corruption offences also entail deprivation of the right to hold certain positions as an additional sanction. But according to the data provided to the monitoring team by Ukraine in 2020, no person has been sentenced to deprivation of the right to hold certain positions or engage in certain activities. If a person having committed a corruption offence is released from liability, he/she could still be subject to disciplinary proceedings under the CPL. Disciplinary procedure, however, does not entail automatic dismissal.[95]

Stakeholders reported that there have been examples of public officials convicted for corruption crimes remaining on in their positions, but the monitoring team is unaware of a specific case that occurred during the reporting period.

Benchmark 9.2.4.

General effective regret provisions are not applied to corruption crimes

In Ukraine, general effective regret provision does not apply to corruption offences. This is explicitly stated in the Criminal Code (Art. 45 of the CC).

[95] Part 2 of Art. 65-1 of the Law of Ukraine "On Prevention of Corruption"

Benchmark 9.2.5.

Any exemption from bribery offence, if stipulated in the law, is applied by courts taking into account circumstances of the case (i.e. not automatically) and with the following conditions:

- voluntary reporting is valid during a short period of time and before the law enforcement bodies became aware of the crime on their own;
- not possible when bribery was initiated by the bribe-giver;
- requires active co-operation with the investigation or prosecution;
- not possible for bribery of foreign officials.

There is a special provision for effective regret for corruption offences providing for release from liability if the person voluntarily reports about the offence before the relevant state authorities become aware of it and if the person actively cooperates with the investigation. This excludes bribery of foreign officials. The release is not automatic (Art. 354 CC).

Stakeholders reported that according to the statistics in 2019, there were instances when persons were released from sentences for active or passive bribery, but it was not clear if these cases fell within the exemption of Art. 354 CC._Ukraine provided statistics in annex 9, where there is one case under Art. 369 CC[96] that was closed due to effective regret. It is not clear how this exemption was applied.

Indicator 9.3. The statute of limitations period and immunities do not impede effective investigation and prosecution of corruption

Background

The statute of limitations have not been revised since the last round or monitoring which deemed 3 years applicable to certain corruption offences problematic for effective investigation and prosecution of cases. It was pointed out that the absence of the suspension of the statute of limitation for the time when a person enjoys immunity from prosecution represents a problem.

Immunities have been amended and weakened in respect of judges and MPs. The Verkhonva Rada no longer has to lift the immunities of MPs in order for investigations to be initiated. On 1 January 2020, the Law of Ukraine “On Amendments to Article 80 of the Constitution of Ukraine (concerning the Inviolability of People's Deputies of Ukraine)” entered into force, which provides that lifting of immunity by the Verkhovna Rada of an MP is no longer required and the Prosecutor General can open an investigation/register a case in the pre-trial registry of investigations against an MP. The Prosecutor General has to sign all procedural actions with respect to MPs (the obstacles this new rule created in practice, with regard to undue interference into investigations and prosecutions, are also discussed under PA 12 and 13).

[96] Offer, promise or provide an improper benefit to an official

Assessment of compliance

Benchmark 9.3.1.

The statute of limitations period and time limit for conducting an investigation, if they exist, are sufficient for the effective enforcement of corruption offences. The law suspends the statute of limitations in certain cases, in particular during the period when the person had immunity from prosecution

Most corruption criminal offenses are grave or especially grave, and therefore the statute of limitations for bringing perpetrators to justice (10 and 15 years, respectively) should be sufficient to ensure the inevitability of criminal liability and punishment. However, some of the corruption crimes in Ukraine are criminal misdemeanours punishable by imprisonment for a term not exceeding 2 years. In this case, the statute of limitations for prosecuting the perpetrators is only 3 years. Such a term is not enough for a full pre-trial investigation and trial, which often leads to the fact that corrupt officials are released from criminal liability after 3 years and without a criminal record. The law does not provide for suspension of the statute of limitations when a person was immune from persecution until the immunity is lifted.

In this regard, the government of Ukraine recognizes that there is a need to amend the criminal legislation so that the statute of limitations for prosecuting perpetrators of corruption and corruption-related offenses is at least 5 years.

There is also a problem with the time limits for conducting an investigation or prosecution of corruption crimes which according to the NABU, are in most cases not sufficient to investigate complex corruption cases, especially when there is a need to apply for international legal assistance. Dependence on the decision of the investigative judge to extend the term increases the risk of undue interference in investigations.

During the visit, the monitoring team was informed that in practice one in every 6 corruption cases has been terminated due to the expiry of statute of limitations in 2020. According to the updated information submitted by Ukraine 12 cases were closed in 2020 due to the expiration of the statute of limitations in 2020.

Benchmark 9.3.2.

Immunities do not impede the effective investigation and prosecution of corruption crimes committed by persons with immunity, in particular, immunities are lifted based on clear criteria and transparent procedures without undue delay

Government and stakeholders agree that immunities impede the effective investigation and prosecution of corruption crimes in Ukraine.

Following the judicial reform in 2016, Ukraine has limited immunities for judges. Judges may now be held in custody in case of commission of grave and especially grave crimes and if apprehended in flagrante delicto. In all other cases, the approval by the High Justice Council must be obtained. In the case of judges, an HCJ decision is required to lift immunity, which hinders the work of law enforcement, due to the delays to lift them. At the same time, HACC convicted 6 judges from 2019-2021.

In respect of MPs, even though the amendments introduced in 2020 removed the requirement for the Verkhovna Rada to provide its approval, the SAPO cannot initiate a case (enter information in the registry to open a case) on its own. Such cases have to be dealt with by the Prosecutor General, this includes opening a case and taking procedural decisions over the case which in practice have impeded effective investigation and prosecution of MPs.

Stakeholders stated that special procedures for investigation of crimes committed by MPs could be ineffective. Political interference can provoke an extra challenge in the investigation or prosecution of persons with immunity. In practice, the NABU and SAPO have already reported publicly about impediments in criminal proceedings against MPs on alleged corruption offences. Currently, a draft Law amending these problematic provisions is pending in Parliament.

Indicator 9.4. Enforcement statistics on corruption offences is used for analysis and available for the public

Criminal statistics in Ukraine are not centralised. Relevant authorities collect, analyse and publish statistics according to their own methodologies, using different templates. There is no continuity or link to the stages of criminal proceedings, and often data does not add up. The need for criminal justice statistics reform is evident and recognised by Ukrainian authorities as well. There is an attempt to have a centralised reporting of pre-trial data in so-called Anti-Corruption Reports that are published quarterly by the Ministry of Internal Affairs, which should also reflect data from other law enforcement agencies but this is not the case in practice.

Assessment of compliance

Benchmark 9.4.1.

The authorities, on a central level, collect and analyse enforcement statistics on corruption offences, including the number of cases opened, cases terminated, sent to court, ended with a final conviction, types of punishments applied, type of officials sanctioned

Ukraine provided information about various sources for statistics on corruption offences. The closest form to centralised data collection are the consolidated Anti-Corruption Reports prepared and published quarterly by the Ministry of Internal Affairs which include related data up until cases are submitted to the courts.

However, according to the authorities not all the relevant state bodies input data in this report. This was confirmed during the visit by relevant bodies (NABU, SAPO, SBI, NACP). In addition, according to the authorities, the lack of a unified system for collecting and analysing statistics leads to situations when not all agencies (NABU, SAPO, SBI, NACP, ARMA) submit data for this report and there is often a mismatch in various sets of data, thus, reform is needed to ensure statistics are accurate and comprehensive.

In regards to court statistics, the State Judicial Administration publishes relevant data. But it was evident from the number of convictions for corruption offences in 2020, that they do not include the data from the HACC convictions. This was confirmed during the visit.

According to the authorities, it is necessary to introduce a unified system for collection, summarizing and visualizing statistical data on corruption and related offenses, as well as on assets derived from corruption

and other crimes. The introduction of an electronic criminal case management system (the law has been already adopted) will be a first step towards this goal.

Ukraine has provided examples of using the analysis of statistics, mainly by the NACP in the context of the Annual National Report on Anti-Corruption Strategy Implementation (dedicated section VIII on statistical indicators, latest one approved on April 2021 by the Cabinet of Ministers) and has as well initiated policy changes based on the results of such analysis.

Benchmark 9.4.2.

Detailed enforcement statistics on corruption offences is regularly published online

There is no centralised publication of enforcement statistics of corruption offences. As explained above, each agency collects, analyses and publishes their own statistical data which are not methodologically linked to the next stage, resulting in inconsistent criminal statistics. For example, the Ministry of Internal Affairs publishes the quarterly Anti-Corruption Report containing statistical data on corruption and corruption-related offences. However, this does not include data for example from the NABU and SAPO, that publish their own reports. The Prosecutor General's Office also publishes its own monthly reports on the investigation and prosecution of corruption. These reports are also published monthly on the website of the Open Data Portal. According to the authorities, the existing system has a number of drawbacks, and improvements are planned as underlined above.

10 Enforcement of Liability of Legal Persons

The law of Ukraine provides for liability of legal persons through so-called "measures of a criminal law nature" (sanctions), but corporate liability is not autonomous and it is linked to the liability of natural persons. Non-monetary measures are not provided in criminal law, but debarment from public procurement is foreseen under Public Procurement Law (PPL). There is no due diligence (compliance) defence to exempt legal persons from liability, but the court takes into account measures taken to prevent corruption when imposing sanctions. Enforcement of corporate liability is still absent after 7 years of introduction of the liability of legal persons in the law. The authorities consider the concept still new and not quite applicable to the Ukrainian context. There are promising initial steps aimed at starting the work on promoting compliance measures in companies by revising relevant criminal law provisions related to due diligence defence and deferred prosecution agreements.

Indicator 10.1. The law provides for an effective standard of liability of legal persons

Background

Ukraine introduced "measures of a criminal law nature applicable to legal persons" (sanctions) in its Criminal Code in 2014. The 4th round of monitoring report has analysed these provisions. There have been no changes in the legislation since then. The monitoring team was informed that the Criminal Law Working Group finalised the draft amendments to the CC that affect this section of the report. These will be analysed during the next assessment, if adopted.

Assessment of compliance

Benchmark 10.1.1.

Liability of legal persons for corruption offences is established in the law

The CC provides for the liability of legal persons (Chapter XIV[1], CC) through measures of a criminal law nature that can be applied to a legal person if its authorised person committed an offence on its behalf or in its interest, and in case of the lack of supervision - a failure of its authorised person to carry out duties to prevent corruption. Corruption offences are considered committed in the interests of a legal person if they are aimed at obtaining an undue benefit by the legal person or create conditions for obtaining such a benefit, or through evading statutory liability. (Art. 96[3] of the CC). Liability covers all corruption offences that are relevant to legal persons, including active bribery of a public official, active bribery of an official of the private sector legal person or a person providing public services, trafficking in influence, laundering of proceeds of crime. Corporate liability is so-called "quasi-criminal", legal entities are not considered as

subjects of criminal law, but this does not contradict the benchmark, which allows for different types of corporate liability for corruption offences.

Benchmark 10.1.2.

Actions of lower-level employees, agents, third parties or beneficial owners (controllers) of the legal entity may trigger corporate liability

Outstanding in Ukraine: Lower-level employees, third parties and beneficial owners are not covered. In addition, the definition of an ”authorised person” is not broad enough to cover persons who are de facto authorised to act on behalf, or effectively control legal person.

Corporate liability can be triggered by an act of an “authorised person” of a legal entity, which is defined as an official of a legal person, or other person who according to the law, statutory documents of the legal person or a contract, have the right to act on behalf of the legal person (Art. 96^3, note 1. of the CC). Lower-level employees and agents are not covered unless they were authorised to act on behalf of the legal entity, neither are third parties, for example an intermediary acting on behalf of the legal entity without formal authorisation but with its tacit approval or upon its instructions. The law does not mention beneficial owners either.

During the visit, the authorities confirmed that a person would need to be explicitly authorised by a legal entity in order for corporate liability to arise. In practice, the authorities are not aware of any case when liability was triggered by actions of a third party or a beneficial owner.

Liability can also be triggered for the lack of supervision by an authorised person, which is positive and could help in the future with promoting internal control, ethics and compliance programmes in companies. There is no record of cases for the lack of supervision.

Benchmark 10.1.3.

Liability of legal persons is autonomous, i.e. not restricted to cases where the natural person who perpetrated the offence is identified, prosecuted or convicted

Liability of legal person is not autonomous and is restricted to cases where the natural person, the perpetrator is identified, prosecuted and convicted. Liability is linked to natural persons both in terms of the substantive and procedural provisions of criminal law: when applying measures of criminal law nature to a legal entity, the court must take into account, inter alia, the gravity of the crime committed and the degree of the perpetrator’s criminal intent (Art. 96^{10} of the CC); proceedings against a legal entity are opened and carried out simultaneously with the relevant criminal proceedings of a natural person and is closed if criminal proceedings against the natural person have been closed or the relevant person acquitted (Art. 214 and 284 of the CPC).

Indicator 10.2. Sanctions for legal persons are proportionate and dissuasive

Background

The sanctions for corruption offences are provided in the CC as measures of a criminal nature and are limited to fines, except for money laundering for which liquidation and confiscation of property can also be applied. In addition, debarment from public procurement is foreseen in certain cases by the PPL.

Assessment of compliance

Benchmark 10.2.1.

The law provides for proportionate and dissuasive monetary sanctions for corporate offences, including monetary fines proportionate to the amount of the undue benefit

For corruption offences, only one type of a monetary sanction– a fine – applies to legal entities; other criminal law measures – confiscation and liquidation – are not applicable to corruption crimes other than money laundering. A fine is applied in the amount double to the "illegally obtained unlawful benefit"; if the benefit cannot be calculated or was not obtained – then a range of fines are applied depending on the gravity of offence (from about EUR 3 000 to 49 000 according to mid-2019 currency exchange rate) (Art. 96^7 of the CC):

- for a criminal misdemeanour - from 85,000 to 170,000 UAH (from 2447 to 4 893 EUR);
- for a not serious crime - 170,000 to 340,000 UAH (from 4 893 to 9 787 EUR);
- for serious crime – from 340,000 to 1,275,000 UAH (from 9787 to 36701 EUR);
- for extremely serious crime – from 1,275,000 to 1,700,000 UAH (from 36701 to 48935 EUR).

In addition, in case other criminal sanctions are applied, the legal entity is obliged to pay the damages in full, as well as undue benefit received or could have been by a legal entity (Art. 96^6.2).

The maximum fine for an extremely grave crime is around 49 000 EUR which is not sufficiently severe to have an impact on large corporations. Monetary sanctions are linked to and should be proportionate to the undue benefit, when the undue benefit has been received or is quantifiable.

The authorities did not provide information about the application of fines in practice since the introduction of the liability of legal persons. According to the responses to the questionnaire, and also confirmed at the visit, there have not been any cases of corporate sanctions since 2018. Authorities stated that such sanctions have been applied previously but statistics or information about the maximum fines applied could not be provided. The monitoring team was provided with one example of fining a legal entity with around 750 USD in fine.

Benchmark 10.2.2.

Non-monetary sanctions (measures) apply to legal persons (e.g. debarment from public procurement, revocation of a license)

Outstanding in Ukraine: Only one non-monetary measure, debarment, is provided for corruption offences, while the benchmark requires at least two of them.

Non-monetary criminal law measures are not foreseen for corruption offences other than liquidation and confiscation for money laundering, however these fall outside the scope of this benchmark, since the benchmark deals with various restrictions and prohibition measures that can be imposed upon legal persons.

With regard to the money laundering offence, the court can use liquidation and confiscation of property (Art. 96^8, 96^9). Similarly, under the law of Ukraine On Prevention and Counteraction to Legalization (Laundering) of the Proceeds of Crime or Terrorist Financing and Financing Proliferation of Weapons of Mass Destruction legal entities (except banks) that carried out financial transactions for legalization (laundering) of proceeds from crime including corruption), can be liquidated by court decision (Art. 32.2). Banks that have carried out financial transactions to launder proceeds of crime may be liquidated by the decision of the National Bank of Ukraine by revoking the banking license. This means that banks that have laundered proceeds from corruption offenses may be subject to a license revocation, resulting in its liquidation.

Debarment is provided under the PPL. A legal entity will be prohibited to participate in the procurement procedure, if it was registered in the Unified State Register of persons who have committed corruption or corruption-related offenses (art. 17.2 of the PPL).

The benchmark encourages a broad range of non-monetary sanctions and requires that the law provide at least two non-monetary sanctions listed in the Guide.

Benchmark 10.2.3.

The law establishes sentencing principles specially designed for legal persons

The Criminal Code provides for the rules for the application of criminal law measures to legal entities. When applying criminal law measures to a legal entity, the court takes into account (Art. 96^{10} of the CC):

- gravity of the crime committed by the authorized person of a legal person;
- the degree of criminal intent of a perpetrator;
- the amount of damage;
- the nature and amount of the unlawful benefit received or that could have been potentially received by a legal entity;
- Measures taken by a legal entity to prevent the criminal offence.

According to the OECD/ACN Guide on Performance Indicators, the sentencing principles or guidelines may cover: what punishment to impose for different types of offences, how to take into account the conduct of the company and its leadership, what mitigating or aggravating circumstances to take into account,

whether the execution of punishment can be suspended and on what conditions, etc. These are not provided in the law.

Indicator 10.3. Due diligence (compliance) defence is in place

Assessment of compliance

Benchmark 10.3.1.

The law allows due diligence (compliance) defence to exempt legal persons from liability or mitigate sanctions

The benchmark requires that the law provides for a defence which the company can use to argue against imposition of sanctions or for mitigation of sanctions. The defence can be formulated in different ways, for example, that the company had sufficient compliance rules and mechanisms and that it did everything in its power to prevent the crime or that the company had an effective internal controls and compliance programme. The court or another sanctioning body should review each specific case and decide whether conditions set for application of the defence have been satisfied.

In Ukraine, the law does not provide for due diligence (compliance) exemption from liability. At the same time, according to the Criminal Code, when applying criminal law measures, the court should take into account "measures taken by the legal entity to prevent the crime" (Art. 96^{10} of the CC). Responses to the questionnaire indicate that this could be considered as a mitigating factor, but there is no practice on this and the provisions lack sufficient clarity.

During the visit, the authorities indicated that discussions are ongoing with business representatives, with the participation of the Business Ombudsman Council, aimed at introducing a due diligence defence. The monitoring team encourages Ukraine to move ahead with this initiative and introduce a due diligence defence as an exemption from liability, or clarify the criminal law provision related to the mitigation of sanctions.

Benchmark 10.3.2.

The law allows the court to defer the application of sanctions on legal persons if the latter complies with organisational measures to prevent corruption as determined by the court

The ongoing discussions mentioned in the benchmark in the assessment of the 10.3.1 include issues of deferred prosecution agreements (DPAs) that could be introduced in the law in the future.

The law may stipulate different measures that can be applied by courts while deferring (suspending) the main sanction, for example:

- To develop and implement a programme of effective, necessary and reasonable internal controls and other measures with the aim to prevent perpetration of the criminal offence.
- To make periodic reports on its business operations and deliver them to the authority competent for supervision.
- To refrain from business activities which might provide an opportunity or incentive for reoffending.

- To eliminate or mitigate the damage caused by the criminal offence.

Indicator 10.4. Statute of limitations period and investigation time limits do not impede effective corporate liability

Background

In Ukraine, the statute of limitations period is tied to the gravity of the crime, which is in turn determined by the applicable sanction (its type and amount/duration).

Assessment of compliance

Benchmark 10.4.1.

The statute of limitations period and time limit for conducting an investigation, if exist, are sufficient for the effective enforcement of corporate liability

The statute of limitations is stipulated in Art. 96[5] CC, which can go from 3 years (for minor offences) to 15 years (for extremely serious crimes). According to the stakeholders, the statute of limitations seems to be sufficient to ensure corporate liability.

In respect of the statute of limitation of pre-trial investigations, from the moment of entering information about a criminal offence into the Unified Register of pre-trial investigations (opening an investigation) until the day of written notification on suspicion, these are:

- 12 months – in criminal proceedings on minor crimes;
- 18 months – in criminal proceedings on grievous or extremely grievous crime. As to the time limits for pre-trial investigations, comments to the PA 9 are relevant here as well (Art. 219.2 of the CPC).

At the same time, the statute of limitations applicable to natural persons will affect the proceedings against legal persons considering that these two proceedings are procedurally tied to each other (see PA 9 benchmark 9.3.1)

In this regard, the government of Ukraine recognizes that there is a need to amend criminal legislation so that the statute of limitations for prosecuting perpetrators of corruption and corruption-related offences is at least 5 years. There is also a problem with the time limits for conducting an investigation or prosecution of corruption crimes which according to the NABU, are in most cases not sufficient to investigate complex corruption cases, especially when there is a need to apply for international legal assistance. Dependence on the decision of investigative judge to extend the term may increase the risk of undue interference into the investigation.

Indicator 10.5. Liability of legal persons is enforced in practice

Background

Liability of legal persons is not enforced in practice in Ukraine. There have been no court decisions on this matter in the last three years and only five cases are ongoing. During the visit, authorities pointed out that corporate liability exists on paper, but its application in practice remains problematic due to various underling concerns. The primary concerns voiced during the adoption of these provisions back in 2014

and which still stands is the belief that “unreformed” law enforcement and judiciary may use this mechanism to exert leverage on businesses and extort bribes or other unlawful benefits. In addition, after 7 years of its introduction in the law, corporate liability is still considered a new concept, outside the frames of the traditional legal system, which may be explained by the lack of political will to introduce the concept in practice.

Assessment of compliance

Benchmark 10.5.1. – 10.5.5.

BENCHMARK	UKRAINE 2020	
	Total	Per 1 million of population
10.5.1. Track record of corporate sanctions applied for corruption offences	0	0
10.5.2. Track record of proportionate and dissuasive sanctions imposed on legal persons, including monetary fines	0	0
10.5.3. Track record of confiscation of direct and indirect corruption proceeds, value-based confiscation applied to legal persons	1	0.02
10.5.4. Track record of due diligence (compliance) applied in practice as a defence or a mitigating factor	0	0
10.5.5. Track record of non-monetary sanctions applied to legal persons	N/A	-
Note: According to the authorities, there are 5 criminal cases against legal persons have been sent to the court. Source: The population of Ukraine is 44 million according to the information provided by the World Bank: https://www.worldbank.org/en/country/ukraine/overview		

Indicator 10.6. Enforcement statistics on corporate liability is used for analysis and available for the public

Assessment of compliance

Benchmark 10.6.1.

Authorities collect, analyse and regularly publish online detailed statistics on detection, investigation, prosecution, trial and sanctions applied to legal persons

According to responses to the questionnaire, Ukraine compiles information regarding procedural developments and final court decisions in all criminal proceedings in the Unified State Register of Court Decisions (https://reyestr.court.gov.ua/). Collection, analysis and publication of statistics on corporate liability (including in connection with the commission of corruption offenses) was introduced in 2018 (https://court.gov.ua/inshe/sudova_statystyka/rik_2020). Information on the implementation of the relevant

provisions of the Criminal Code is reflected in the form of national judicial statistics, which is published semi-annually on the official website of the State Judicial Administration.

In addition, in accordance with Article 20 CPL, the NACP prepares an annual national report on the implementation of the principles of anti-corruption policy. The national report reflects statistical data on the results of the activities of specially authorized entities in the field of anti-corruption and includes criminal statistics.

However, the monitoring team has not been provided with the evidence that the corporate liability is part of the criminal justice statistics. According to the authorities, this is mainly due to the fact that there have been no cases since 2017. During the visit the authorities underlined that statistics on corporate liability do not exist, because there have been no cases of corporate liability since the system of data collection on corporate liability was put in place in 2018. They stated that if there are such cases, court statistics and the NACP annual report would capture them, since the mechanism for information gathering is available.

11 Recovery and Management of Corruption Proceeds

Since 2017, Ukraine has made significant progress in reforming its asset recovery and management legislation. The Asset Recovery and Management Agency (ARMA) was established as the dedicated body of specialized practitioners who conduct financial investigations to find, trace and manage assets. Other investigative bodies are also authorized to conduct financial investigations to trace assets and do so in practice proactively. The ARMA and the other investigators have direct access to most sources of important information to do this work. The ARMA provides annual reports on its activities.

In the management of assets, during the reporting period, the ARMA had broad authority to sell certain types of assets using a competitive process with the sale proceeds held until the case is resolved. The ARMA uses a state-owned entity to conduct these sales through electronic auctions. For assets which must be managed under the law, the ARMA hires contractors competitively to handle this function subject to regular audits by ARMA's staff.

While there is room for some improvement, there is great awareness of what needs to be done. It is critically important to provide adequate resources and legislation, if needed, to complete the development of the registry of seized and confiscated assets, to allow for effective pre-seizure planning by the ARMA with criminal investigators and prosecutors which will also help to prepare documents for courts to reduce mistakes about the property to be seized or confiscated, to develop a unified registry of bank accounts and safes, and modify the law to allow disclosure of payee account numbers by banks. Importantly, modifications also need to be considered to ensure a greater level of insulation from political interference in the management of complex assets.

As of this reporting period, in high-level corruption cases conducted by the NABU and the SAPO, the extent to which assets have been restrained pending final confiscation is unclear and it appears that final confiscation has been ordered in only two high-level cases so far in May 2021 resulting in UAH 9.2 million in funds and other property. The NABU reports funds recovered and assets seized for confiscation in cases submitted to court. The few final confiscation orders appear to be due in large measure to the fact that the 1) the HACC, responsible for high level corruption cases, has only recently completed some of its cases and 2) the Constitutional Court decision halted enforcement of the unexplained wealth laws (illicit enrichment) which would normally be expected to result in confiscations in this reporting period. Figures on confiscation in corruption related cases by other investigative and prosecution bodies were not provided. Statistics on confiscations in high-level corruption cases handled by other courts or investigators are not easily available.

In cases involving property to be confiscated that is located abroad, practitioners should consider seeking enforcement of more restraining orders pending confiscation and enforcement of final confiscation orders issued by the HACC where foreign governments can increasingly be more confident that adequate due process protections are observed. This tool is also in line with international standards and can be a very efficient way to recover significant assets.

Indicator 11.1. The functions of identification, tracing, management and return of illicit assets are performed by specialised officials

Background

In 2017, the ARMA was established as a dedicated body for finding, tracking and returning the proceeds of corruption. In the process of writing this report, in August 2021, new amendments to the law on the ARMA regarding its operations were adopted. The monitoring team did not have an opportunity to review the law in detail, but it appears that the risks to strip the ARMA of important functions that seem to be present in the earlier versions of the draft have been removed and the adopted version is a step forward towards improved management of assets in Ukraine and better access to complete bank records.[97]

Assessment of compliance

Benchmark 11.1.1.

Dedicated bodies, units or groups of specialised officials dealing with identification, tracing and return of corruption proceeds (asset recovery practitioners), as well as with the management of seized and confiscated assets in corruption cases are established and function in practice

All functions listed in the benchmark are assigned by law to the ARMA, but the work to identify assets and to trace assets may also be performed by the NABU and other investigative bodies, and to some extent the NACP.

The ARMA is a central executive authority responsible for finding, tracing, and returning proceeds of corruption as well as their management. The ARMA is not responsible for liquidating confiscated assets. The ARMA is also responsible for cooperation with foreign jurisdictions for asset recovery. Funds recovered are to be paid into the revenue of the State. No information was provided on the process for liquidating confiscated assets or its results.

Assets come into ARMA's management based on motions by a prosecutor and a decision of an investigative judge, court or the consent of owner. When ordered, the ARMA should be provided a copy of the order not later than the next business day after its issuing.

ARMA's funding comes from the State Budget of Ukraine. By law, the ARMA has a central office in Kyiv and six territorial offices around the country staffed since beginning in 2019. The government provided information indicating that the staff of the Central office in Kyiv increased from 103 employees in 2018 to

[97] TI Ukraine (14 July 2021), Rada won't let management of seized assets be destroyed!

148 employees in 2020. The staff of the regional offices increased from 40 employees in 2019 to 56 in 2020. As of August 1, 2021, ARMA manages more than 10,000 assets.

Some CSO reports raise questions about ARMA's cost efficiency. In addition, according to a news article by TI Ukraine, "the leaders of the state understand the capabilities of the body, but too many political forces want to influence the selection of the future ARMA head, and therefore a commission for the selection of the head has not been formed for more than a year and a half,[98] and that "the absence of an actual leader is a convenient mechanism for ensuring loyalty of the body and the key to obedience.[99]

The monitoring team also notes news reports that in 2019-2020, a criminal investigation was initiated and searches conducted in connection with allegations that certain assets transferred to the ARMA were then fraudulently transferred to others using false court and other documents. It is not clear that there were assets seized in any corruption cases. The reported suspects include an MP, the head and other former high-ranking officials of the ARMA. The Monitoring team has been advised that additional steps are now required to further limit the possibility of distributions from ARMA's supervision through enhanced verification of court orders. The monitoring team also notes that the case is still pending.

Indicator 11.2. Identification and tracing of corruption proceeds are effective

Assessment of compliance

Benchmark 11.2.1.

Investigative bodies and asset recovery practitioners use direct access to state databases for corruption investigations and recovery of proceeds of corruption

Benchmark 11.2.2.

Investigative bodies and asset recovery practitioners use direct access to financial information, including a central registry of bank accounts, and mechanisms to overcome bank secrecy for corruption investigations and recovery of proceeds of corruption

Both of these benchmarks are focused on ensuring the effectiveness of investigative bodies and asset recovery practitioners in conducting necessary investigations to recover assets linked to corruption. Based on information provided to the monitoring team, the ARMA, NABU and SBI investigators all have direct access under Ukrainian law to all databases and sources of information they need to perform the functions of investigating, finding and tracing corruption proceeds and other assets, including information maintained by the government, including tax and export information and banking information for individuals and legal persons. Information was provided that these investigative bodies conduct such investigations and use

[98] ARMA informed the monitoring team that the selection commission was established in September 2021.
[99] TI Ukraine (5 August 2021), Arma: what's wrong with the agency?

these databases and are obtaining information from foreign authorities and from sources of information like private auditors, notaries and liquidators.

According to information provided by the government, the ARMA is aggressively looking to expand the available sources of information for its investigative work including from databases maintained by international law enforcement bodies and by exploiting digital information. For example, as part of the implementation of the function of detection and tracing of assets the ARMA has established access to and uses a new Europol platform for operational information analysis - CONAN (Connecting Analysts); the Stolen Works of Art database; Europol's SIRIUS platform, which helps to investigate criminal offenses using evidence from the Internet. The ARMA is also working with information technology experts to gain access to information from mobile devices and crypto archives.

No issues of lack of access or unreasonable delays in access were presented with two exceptions. Monitors were advised that the NABU, SAPO, ARMA and SBI are allowed access to financial records upon written requests which are responded to generally. However, the NABU, SAPO and ARMA reported the absence of a central registry of bank accounts of individuals and legal entities and safes maintain for customers at such institutions and the non-disclosure of payee account information from account holder records is not in line with international standards and inhibits effective work of the investigators. Ukraine has no central registry of natural or legal entities holding or controlling payment and bank accounts and deposit safes (see discussion under PA 12). The IAP 4th round monitoring report recommended Ukraine to establish such a registry. The monitoring team notes that as the ARMA pointed out that these deficiencies are not within ARMA's control.

Box 11.1. Results of ARMA's Investigations

According to the information provided by the ARMA, access to state databases makes it possible to obtain information on the assets of participants of corruption crimes and related parties. In 2020, the following assets were identified and traced:

- agricultural machinery with components: 1,508 units;
- land plots: 6,229 units;
- real estate (residential and non-residential): 11,696 units;
- property rights of intellectual property, intangible assets: 953 units;
- vehicles: 1,874 units;
- other property (goods and products): 24,501 units;
- shares in the authorized capital: UAH 25,381 million;
- securities: 5,783 million UAH;
- cash (UAH): 1,737.6 million;
- cash (USD): 130.9 million;
- cash (EUR): 6.9 million

Source: ARMA Activity Report 2020

Benchmark 11.2.3.

Active and secure exchange of information among asset recovery practitioners, financial intelligence units, investigative and prosecutorial bodies is ensured in practice

The State Financial Monitoring Unit reported its statistics regarding information provided to the NABU and SAPO which is discussed in PA 12. No data was provided about sharing information by the State Financial Monitoring Unit with the ARMA.

According to the ARMA, in 2020, it received and responded to a total of 2,263 requests from investigators, detectives, prosecutors, courts and competent authorities of foreign states that included requests from the NABU as highlighted below in PA 12. The ARMA also noted in its 2020 annual report that the number of these requests has more than doubled in the period from 2018 to 2020. In total, from 2017-2020, the ARMA processed 5,096 requests from investigators, detectives, prosecutors, courts.

For 2020, the ARMA also reported that in carrying out its work in 2020, 2,538 written requests were sent to banking institutions and 950 to state bodies for information. It is unclear how many of these requests pertain to corruption cases other than 46 requests from the NABU that concern high-level corruption. The NABU also has the legal authority and capacity to conduct its own financial investigations and several other bodies also have some jurisdiction for corruption related offenses (see PA 12).

The ARMA also provided examples of how it is consulted by the NABU and SAPO on restraint of assets in their cases though they noted that amendments to the law are needed to allow greater and earlier participation in criminal investigations to ensure assets, which should be seized or restrained subject to confiscation, are properly described and the basis for each provided in the pleadings to the court.

The ARMA also provided examples of how the orders entered by courts are sometimes narrower than the facts appear to justify for restraints which is illustrative of the need for greater communication between the ARMA and prosecutors and investigators when asset seizures are sought. On January 14, 2019, the investigative judge of the Pechersk district court of Kyiv city ordered to transfer to the ARMA assets arrested and recognized as material evidence in a criminal investigation. These assets included unauthorized construction of 13 residential and business development projects in Kyiv. This decision was sent to the ARMA together with an appeal of the prosecutor in this case on January 22, 2019. However, based on these documents the ARMA was able to take over assets of only two of the residential development projects. According to the ARMA official, the court's decision on the other 11 projects did not follow the requirements of the CPC and therefore could not be implemented. This analysis was conducted by the ARMA in May 2019 and sent to Prosecutor's General Office in June 2019. These delays did not allow the ARMA to be effective in managing these assets.

The ARMA emphasized that its asset recovery specialists use secure communication channels and servers to exchange, process and store confidential information in accordance with various Ukrainian laws ensuring privacy. The ARMA receives and shares information by postal channels and an electronic mail system, designed to accept requests signed by a qualified electronic signature of the applicant, which relate to the main tasks, powers and functions of the ARMA.

Benchmark 11.2.4.

BENCHMARK	UKRAINE 2020	
	Total number of cases	Per 1 million of population
11.2.4. Track record of the use of parallel financial investigations conducted with the involvement of financial analysts or financial investigators and other relevant experts	N/A	N/A

Benchmark 11.2.5.

Requests of foreign jurisdictions for the identification tracing, seizure, other restraints or confiscation orders concerning assets in corruption cases, if received, are executed without delay

Benchmark 11.2.6.

Requests to foreign jurisdictions for asset identification, tracing, seizure or confiscation in corruption cases (including non-conviction based forfeiture, if available) are made without delay

According to the ARMA, it is engaged in responding to requests from foreign jurisdictions for international legal assistance regarding the identification, search, tracking and seizure of assets. As part of the cross-border exchange of information, in 2020 the ARMA sent 106 requests for finding and tracing of assets in criminal proceedings at the request of law enforcement agencies to many foreign countries. In the same period, the ARMA processed 53 requests from the competent authorities of foreign countries on finding and tracing for assets. The number of received and processed requests from competent foreign authorities has increased by more than 3 times compared to 2018 (in total since 2017 - 87). All requests have been processed and answered. Even though information about corruption cases specifically has not been provided, the ARMA reported no delays in connection with its requests and noted that it is actively establishing relationships with other practitioners abroad both in formal and informal bodies to ensure efficient work and to continue to learn beast practices. The ARMA exchanges information on asset finding and tracing with more than 40 foreign countries. While little information was provided about requests for restraints or seizures or confiscation in corruption cases abroad, Ukrainian authorities did request the enforcement of a Ukrainian court's restraining order against certain real property by the United States in 2019 in a case investigated by NABU and prosecuted by the SAPO. The order has been enforced and the property in the United States continues to be restrained pending the outcome of the case in Ukraine.

The ARMA reported it did not participate in any formal proceedings with international partners for the investigation of assets abroad like formal joint investigations because it was not invited to do so by the NABU or other authorized investigators.

The ARMA also noted that it is seeking legislation that would allow it to hire private counsel to litigate in foreign courts on behalf of Ukraine to try to recover assets. The monitoring team advise that the ARMA proceed with extreme caution in this approach. While often profitable for the private counsel retained to try to recover assets, this is rarely effective in recovering on a timely basis or at all. In most countries, to recover assets, there must be evidence of the underlying crimes linked to the funds in a form admissible in foreign courts. Countries are much more likely to recover assets abroad efficiently and cost-effectively where they conduct their own investigations of the crimes which generated the illicit proceeds traced to locations abroad and obtain the assistance of foreign prosecutors and law enforcement authorities to recover the proceeds using the foreign evidence. Alternatively, countries can obtain orders for restraint or final confiscation from their own courts under circumstances which establish due process was observed and seek the enforcement of the orders in the courts of the countries where the assets are located.

Indicator 11.3. Confiscation measures are enforced in corruption cases

Assessment of compliance

Benchmark 11.3.1.

Provisional measures are routinely applied to prevent the dissipation of assets

Ukraine did not provide any specific evidence about use of provisional measures to prevent dissipation of assets, even though during the visit the authorities mentioned it is being done. In the ARMA activity reports it is not possible to identify assets seized in corruption cases as opposed to all other cases.

Benchmark 11.3.2.

Confiscation of instrumentalities and proceeds of corruption offences is routinely applied and executed

This benchmark requires confiscation as a final (entered into force) deprivation of property ordered by a court or other competent authority is routinely sought and applied and from this record. According to the provided information, there are two recent cases in which confiscation was imposed by the HACC in high-level corruption cases. In several cases involving unjustified assets confiscation was apparently sought but dismissed based on the Constitutional Court ruling that the law is invalid. From the NABU biannual reports, it appears that seizure pending confiscation and confiscation is sought routinely in high-level corruption cases. The ARMA reported on all crimes which likely include seizures in high-level corruption cases and seizures and confiscations in lower level corruption cases, but the law does not require ARMA to keep disagregated statistics only on corruption offenses. Based on the information received, the monitoring team cannot conclude whether confiscation of instrumentalities and proceeds of corruption offences is routinely applied and executed or not.

Benchmark 11.3.3. – 11.3.8.

BENCHMARK	UKRAINE 2020	
	Total number of cases	Per 1 million of population
11.3.3. Track record of confiscation of derivative (indirect) proceeds of corruption offences	N/A	
11.3.4. Track record of confiscation of the instrumentalities and proceeds of corruption offences transferred to informed third parties	N/A	
11.3.5. Track record of confiscation of property the value of which corresponds to instrumentalities and proceeds of corruption offences (value-based confiscation)	N/A	
11.3.6. Track record of confiscation of mixed proceeds of corruption offences and profits therefrom	N/A	
11.3.7. Track record of non-conviction based confiscation of instrumentalities and proceeds of corruption offences	N/A	
11.3.8. Track record of extended confiscation in criminal cases	N/A	
Note: Ukraine did not provide data to assess compliance with benchmarks 11.3.3-11.3.8 and referred to the activity report of ARMA for 2020, which does not seem to contain requested data. From open sources the monitoring team aware of 2 confiscations in 2020. Source: The population of Ukraine is 44 million according to the information provided by the World Bank: https://www.worldbank.org/en/country/ukraine/overview		

Indicator 11.4. The return and further effective and transparent disposition of the corruption proceeds is ensured.

Background

This indicator looks into the country's efforts to successfully recover assets from abroad during the prior calendar year. The focus is on the actual transfer of assets. The country has to provide information about the total amount recovered in the prior calendar year in proportion to the total amount seized or frozen abroad. The Indicator also looks at the openness and transparent use of the returned assets.

There are widespread published reports of significant proceeds of grand corruption in Ukraine which are outside of Ukraine still in the control of the corrupt former officials. The government of Ukraine has reported no funds returned to Ukraine based on its actions to obtain confiscation orders in this reporting period.

The government did report on the return of certain funds recovered by the Swiss government in the reporting period, but no information on the proportion these funds represent out of the total amount of funds seized or frozen abroad.

The PGO working with its own investigators has been responsible for cases of grand corruption in which no funds were recovered through litigation by Ukraine during this reporting period dating from the Yanukovich administration and earlier. Some of these matters are expected to be transferred to the NABU but it is not clear if some have been or may also be transferred to the SBI.

Assessment of compliance

Benchmark 11.4.1.

BENCHMARK	UKRAINE 2020		Score	Level
	Total number of proceeds	Total number of returned proceeds (%)		
11.4.1. Track record of the return of corruption proceeds from abroad	N/A	N/A		

The government reported that approximately 7.589 million EUR was returned to the state budget of Ukraine in 2020 and 2021 by the Swiss government. These represent proceeds of corruption involving former President Lazarenko and others associated with his criminal activity and other corruption schemes. The PGO and the Swiss government are also in discussions about the possible recovery and future return by the Swiss government to Ukraine of approximately 51.772 million EUR involving corruption proceeds of former President of Ukraine and certain senior members of his administration. No information was provided about the proportion that this return represents out of the total amount seized or frozen overseas.

Benchmark 11.4.2.

There is a wide perception among the main stakeholders that the transparent and effective use, administration and monitoring of returned proceeds is ensured, and their disposition does not benefit persons involved in the commission of the respective corruption offence.

Among stakeholders, the perception is that before the creation of the NABU the government had no commitment to prosecuting high-level corruption and recovering proceeds of corruption despite the huge scale of corruption in Ukraine at the highest levels. The national strategy seemed to be to accept any recoveries that other countries could obtain with as little cooperation as the Ukrainian government could provide. In some cases, parts of the government actually appeared to actively thwart foreign seizure and enforcement efforts, including in the United Kingdom. Some funds have now been returned from abroad, including from the Switzerland, but their disposition has, for the most part, been cloaked in secrecy. The government reported only that the returned funds were placed in the state budget of Ukraine. There is no information about any subsequent distributions. The monitoring team notes that in 2017 or 2018 there was

a reportedly "classified recovery" to protect witnesses of approximately 1.5 billion USD in assets in Ukraine and abroad and some concern that a large portion of the proceeds was paid out to agribusiness firms in a non-transparent way.

Indicator 11.5. Management of seized or frozen assets is cost-efficient and transparent

Assessment of compliance

Benchmark 11.5.1.

Regular audit of the management of assets subject to provisional measures and confiscated assets in corruption cases, including on its cost-efficiency, is conducted by external independent auditors and its results are publicly available

Outstanding in Ukraine: Regular external audit does not cover cost-efficiency issues. Latest reports are not published

While an annual audit of ARMA's activities is required by law to be conducted by external independent auditors, as indicated in the ARMA 2020 activity report, it does not appear to include the cost efficiency of the management of assets as required by the benchmark. Also, while a report of an audit in 2018 is available online, reports of audits conducted in 2019 and 2020 were not provided to the monitoring team and do not seem to have been published. For the 2018 external audit, it is not clear how the auditors who conducted the 2018 audit were selected. The benchmark requires a competitive selection or a proposal by independent parties, such as civil society organisations or international partners.

ARMA's own audit reports together with annual external audit reports are also supposed to be provided to the public on the ARMA's website. The ARMA is also required by law to engage with a public council and to be subject to an audit by a Commission established by the Cabinet of Ministers with published reports. Civil society representatives noted delays in posting audit reports for 2020 on the website.

Benchmark 11.5.2.

Where possible, contracting of private sector actors as asset managers and disposal of seized or confiscated assets is conducted on a competitive and transparent basis

According to Ukrainian law, seized assets including movable and immovable property, securities, proprietary and other rights shall be managed by the ARMA pending the entry of any final confiscation order by means of sale of the relevant assets or transfer of them to outside managers. During this reporting period, the ARMA has had significant authority to sell certain types of assets transferred to its management to maximize their value. For assets that will not be immediately liquidated, those managers are to be selected on a competitive basis under the procedure provided for by the PPL. Upon selection, the assets are transferred to legal entities or private entrepreneurs to manage on the basis of an agreement to be concluded in compliance with Ukrainian law (chapter 70 of the Civil Code of Ukraine). Aside from overseeing the process for selection of the managers, ARMA's role in managing assets is to conduct regular audits of the managers.

ARMA's Tender Committee on Asset Management has developed and approved the Procedure for Competitive Selection of Asset Managers, which defines the mechanism for selecting business entities to manage the assets transferred to the ARMA. The procedure regulates all stages of the competition, determines its content and conditions, in particular, open and public competition with stated criteria for qualifications of managers and for determining and selecting the winner of the competition. The Cabinet of Ministers of Ukraine shall determine the procedure for control over asset management efficiency.

For assets that will be sold quickly with the proceeds held pending final confiscation, the law specifies the types of seized assets that the ARMA is authorized to sell as including things or large batches of goods, the storage of which due to bulkiness or for other reasons is impossible without unnecessary difficulties or costs incurred to ensure special conditions of storage of which or management of which are commensurate with the value of such property; property which quickly depreciates; as well as property in the form of perishable goods or products which shall be sold at prices no less than the market prices. The Cabinet of Ministers of Ukraine shall determine a provisional list of such property.

For specified categories of assets, they may be sold without consent of the owner on the basis of a decision issued by an investigative judge or court, with a copy of such decision sent to the ARMA immediately after issuing such a decision.

Assets transferred to the ARMA may also be sold upon consent of their owner. A copy of the order on consent shall be provided to the ARMA together with a relevant application from the prosecutor. Sale of assets is carried out by legal entities determined on a competitive basis.

The procedural rules which regulate the sale of seized assets in criminal proceedings are set out in the provisions of various resolutions of the Cabinet of Ministers of Ukraine. Electronic auctions are conducted by the organizer(s) of electronic auctions who are to be selected through a competitive process by the ARMA in the manner also prescribed by the Resolution of the Cabinet of Ministers of Ukraine. Cabinet of Ministers resolutions also specify the method of conducting and electronic auction with the aim of maximizing the sale prices.

Furthermore, it is important to note that there is a minimum threshold of value for assets that can be transferred to ARMA's control which appears to stakeholders to be at an appropriate level.

The government advised that there were no confiscation orders in high-level corruption cases during the reporting period. The government reported that there was one in March 2021, and there has now been a second order. Accordingly, for high-level corruption cases, the process for sale of managed confiscated assets other than funds has not been completed. Since assets managed by the ARMA in other corruption matters are not reported on by the type of offense, it is not possible to analyse the specific results in corruption cases from the public records for assets in lower level cases.

The government and civil society noted that there have been some issues with the management of assets involving contracted managers. For example, the manager of the companies seized which were providing heat in three cities of Novoyavorivsk and Novyi Rozdil, Lviv region for the heating season 2019/20 was not competently operating these companies and the management agreements were terminated. Because of the emergency situation created, by the decision of the ARMA's Tender Committee a new manager was elected outside of the competitive process, namely: LLC "Naftogaz Teplo", which is part of the group of companies "Naftogaz of Ukraine" and is able to ensure stable heating in both cities. Additionally, there was a complaint made to the Business Ombudsman about selection of an asset manager.

Among respondents, civil society representatives in general acknowledged major improvements in this area but expressed some scepticism about how the system is actually working in the absence of more

transparency and integrity in the process and the results. For seized properties which are sold pending final confiscation, the process of organizing the sales to receive bids and conducting the sales (through electronic bidding) is handled by the same state-owned enterprise called SETAM. There is a concern that SETAM is more interested in quick sales than sales that maximize recoveries. There are additional concerns about the fact that SETAM verifies the qualified buyers for the sales it manages with no public reporting on the reasons or timing. This allows no clear path for objections by disqualified participants or a record for inquiring into conflicts of interest. Additionally, there are concerns that SETAM's descriptions of the property to be sold may be inaccurate or intended to interest only people with inside knowledge of the real goods to be sold. They also note that in high-level corruption cases, there is no established record.

Stakeholders noted that the procedure for selecting managers is perceived to be subjective and non-transparent (without live broadcast of committee meetings and publication of minutes)[100] and some managers, overestimated the cost of maintaining assets and, accordingly, gave less to the budget.[101] Stakeholders noted several factors that create conditions for high-level interest in an opaque and competitive procedure for selection of managers of seized assets, especially involving high-level corruption cases including:

- The ARMA often receives "high-profile" assets to manage (including for example, Mezhyhiria, Parkovyi center, Ukrainian Media Holding), which creates public and media pressure on the ARMA.
- Asset owners do not want to lose control over their expensive property and resort to administrative and media pressure (including for example, HPPs in the Lviv region, and the Rostok case).
- There is imperfect legislation and mechanisms for selection of managers.
- Because of the reporting structure and dismissal powers, there is the possibility of administrative pressure on the Head of ARMA by the Cabinet of Ministers who have authority to dismiss the Head of the Agency without explanation or reasons; and
- General concerns of corruption within the executive authorities of Ukraine.
- Recent legislative amendments are intended to further improve the process to maximize recoveries for properties to be sold on an interim basis and other reforms.

There is a need to continue to monitor and improve the process of the sale of seized and confiscated assets and the process for selection of the sellers and managers. The monitoring team was informed that some improvements to the procedures have been made after the on-site visit which will be considered in the next monitoring report.

[100] ARMA noted that the law does not require live broadcast of committee meetings.
[101] Project Liga (5 August 2021), ARMA: Manages billions, loses hundreds of millions. What is wrong with the scandalous agency?

Benchmark 11.5.3.

A database of assets in corruption cases placed under the management of the state, which contains data on location, value, and other relevant information about the respective assets, is maintained and published online

The benchmark requires the creation and maintenance of an electronic database of seized, frozen or confiscated assets in corruption cases that are placed under the management of the state and public access to such database except for confidential or personal information.

The ARMA has established the Unified State Register of Assets seized in criminal proceedings (hereinafter – the Register http://test.arma.gov.ua/#/) but as of 2020, it is launched in a test mode due to a lack of funding to complete the project. The total number of entries in the Register of seized assets at the time of the monitoring was quite significant: more than 10.7 thousand, of which: real estate - more than 1.8 thousand, land plots - 0.3 thousand, vehicles - 1.9 thousand, shares and stakes in authorized capital - 4.8 thousand, property complexes - 8.

When completed, under Ukrainian law this database shall be open, except for data concerning: the description, characteristics of assets (property), the specific address the property and the legal owner; the suspect or accused involved; and other data that is not subject to disclosure in the framework of international cooperation in accordance with the international agreements of Ukraine.

Accordingly, the ARMA appears to keep detailed records but the public cannot easily access statistics regarding assets in corruption cases except apparently by searching by the court or the prosecutor. Since not all corruption cases are handled by the HACC, the information is not easily obtained. The NABU and SAPO do not provide detailed information about assets seized subject to confiscation proceedings either. The PGO reports that it periodically reports statistics on use of arrest and finally confiscated assets on its website.

The only register of assets is the one kept by the ARMA and at this time it is operational only in test format and it is not intended to allow users to see data on assets linked to specific crimes, including specifically on assets linked to corruption cases.

Indicator 11.6. Data on asset recovery and asset management in corruption cases is collected, analysed and published

Assessment of compliance

Benchmark 11.6.1.

Comprehensive statistics on the application of seizure and confiscation measures in corruption cases is collected, analysed and regularly published online

Total statistics are kept by the ARMA on the application of seizure and confiscation measures but not by the type of crime. The NABU provides information about confiscations when they have been ordered but it is difficult to discern if seizures reported are for confiscation or evidence. The PGO does not seem to

provide statistics about seizures or confiscations by the SAPO or by other prosecutors handling corruption cases.

Benchmark 11.6.2.

Regular, at least annual, reports containing detailed statistics related to the work of officials dealing with identification and tracing of corruption proceeds, as well as with the management of assets subject to restraining measures and confiscated assets, including information on the outcomes of their work, are published online

By law, ARMA must provide annual reports containing details of its work by April 15 on its official website (*https://arma.gov.ua/zvit-pro-robuty*). While the reports contain most of the categories of information required in the benchmark, including gross statistics of assets in their control and the disposition of those assets, they do not provide details about assets under its control or transferred from its control involving corruption offenses specifically. Without this specific information on seizures pending confiscation and confiscation involving assets in corruption cases provide by the ARMA or other bodies on an annual basis.

12 Investigation and Prosecution of High-Level Corruption

Ukraine has made an unprecedented leap in tackling high-level corruption through the establishment of dedicated independent investigative, prosecutorial and judicial institutions (NABU, SAPO and HACC). The number of convictions in high-level corruption cases as such is not used as key indicator for assessing effectiveness of anti-corruption policy, but this number is increasing as the recently established HACC started concluding cases. Still a relatively low level of convictions in high-level corruption cases in Ukraine during this review period is mainly due to the fact that the HACC has only recently begun to function and to work on the backlog of cases under its jurisdiction but also the CCU decision which required all the unexplained wealth cases to be closed.[102] While, proactive detection of high-level corruption cases based on various sources is ensured, but the cases detected based on FIU reports and asset declaration verifications in the reporting period are not particularly high. Information on investigations in high-level corruption cases and its results are routinely communicated to the public.

Nevertheless, as commonly acknowledged, including by Government reports,[103] high-level corruption remains widespread and the effectiveness of combatting it is being continually undermined in various ways. There is a strong perception among key domestic and external non-governmental stakeholders that investigation, prosecution and adjudication of high-level corruption cases is subject to strong political or other undue interference. While many high-level corruption allegations have been dealt with in accordance with the applicable law, there are a number of concerning recent examples of aggressive interference and attempts to manipulate the system to accomplish the result of preventing the authorized independent anti-corruption bodies from handling certain politically sensitive matters. This poses a serious threat to the rule of law and fight against corruption in Ukraine.

[102] Another CCU Decision of October 2020 that affected the asset declaration related provisions has not been referred to here since the section deals with corruption offences only, that does not include offences related to asset and interest disclosure for the purposes of the indicators.
[103] NABU (2021), NABU Report, First half of 2021; NACP (2021), Annual Reports; NACP (2021), Anti-Corruption Strategy for 2020 – 2024.

Indicator 12.1. Fight against high-level corruption is given a high priority

Background

For the purposes of the pilot monitoring, "high-level corruption" means corruption offences involving: 1) in any capacity punishable by criminal law (e.g. as masterminds, perpetrators, abettors or accessories) the high-level officials; and 2) substantial benefits for the officials or their family members or other persons (e.g. legal persons they own or control, political parties they belong to) and/or significant damage to public interests.[104]

"High-level officials" are the following appointed or elected officials: the President, members of Parliament, members of Government and their deputies, heads of executive and other central public authorities and their deputies, the staff of private offices of political officials, governors, mayors of country's capital and regional capital cities, judges, prosecutors, top managers and executive and supervisory board members of the 10 biggest SOEs in the country, and any other officials defined as politically exposed persons under the national law.[105]

Assessment of compliance

Benchmark 12.1.1.

Convictions in high-level corruption cases are among key criteria for the assessment of the effectiveness of anti-corruption policy

This benchmark has a narrow focus and requires the country to demonstrate that convictions in high-level corruption cases obtained in lawful proceedings are applied as a key criterion for assessing the effectiveness of anti-corruption policy, for example, through inclusion of the respective indicators in anti-corruption policy documents.

Ukraine provided many examples to show that the fight against high-level corruption is prioritised, referring to various Government documents and reforms. CSOs responses to the monitoring questionnaire confirmed that Ukrainian authorities focus on the issues of high-level corruption in policy planning and implementation. But clear evidence to conclude that convictions in high-level corruption cases are used for the assessment of the effectiveness of anti-corruption policy as required by this benchmark, is missing. During the visit, Ukrainian authorities disputed the use of convictions as an indicator of effectiveness of fighting corruption. In their view, this indicator could be replaced by enforcement indicators related to various stages of proceedings: detection, prosecution and submission of cases to court.

---

[104] For the purposes of performance indicators, a substantial benefit or significant damage, if they are of a pecuniary nature, shall mean any such benefit or damage that is equal or exceeds the amount of 3,000 monthly statutory minimum wage fixed in the respective country.

[105] The definition of high-level or high-profile corruption for which specialised anti-corruption law enforcement bodies of Ukraine have jurisdiction, partially overlaps with this definition, but it is broader.

The Annual National Anti-Corruption Report includes statistics related to the work of the institutions aimed at addressing high-level corruption, including the NABU, SAPO, HACC, ARMA but anti-corruption policy documents (previous Strategy or current draft Strategy)[106] do not include such an indicator.

While recognising the resources and efforts put into tackling high-level corruption in Ukraine convictions have not been used as indicator of effectiveness of anti-corruption policy during this reporting period.

Indicator 12.2. Criminal statistics on high-level corruption is published analysed and used in updating policy

Assessment of compliance

Benchmark 12.2.1.

Detailed statistics on the detection, investigation, prosecution and adjudication of high-level corruption is regularly published online and used to change policy or practice if necessary

This benchmark requires centralised collection and regular publication of detailed statistics, disaggregated by offences, on high-level corruption cases opened, terminated, sent to court, ended with final conviction, and types of sanctions applied by courts.

As explained in PA 9, the collection and reporting of criminal justice statistics in Ukraine is not centralised, it is rather fragmented and most of the time incoherent and incomplete. Some of the same issues persist for statistics of high-level corruption cases. Even though the NABU and SAPO are responsible under the law for most of the allegations of high-level corruption and regularly publish biannual joint reports on the results of their work that include data on some of the listed indicators, these reports cover only their cases and do not cover corruption cases investigated and prosecuted by other law enforcement agencies. The HACC also publishes information about adjudication of cases but these again do not include cases prosecuted by other investigative authorities in other courts. In addition, Annual Anti-Corruption Reports include data on some of these indicators, but due to the lack of centralised, unified statistics, this Report does not show the full picture either. After the visit, Ukraine noted that the General Prosecutor's Office (GPO) has been tasked with improving and unifying of reporting of statistical data by specially authorised anti-corruption entities which will begin in December 2021. In addition, the GPO is considering using the Unified Register of Pre-trial Investigations for generating unified statistics on corruption. The monitoring team welcomes these developments that will be assessed next year.

Regarding the second element of this benchmark, the monitoring team was not presented with any evidence on how statistics specified in the benchmark have been used to change policy or practice as required by the benchmark for this reporting period. In the answers to the monitoring questionnaire, civil society representatives stated that the analysis of criminal statistics on high-level corruption investigation and adjudication would merit more focus in the Annual Anti-Corruption Reports.

[106] Adoption of the Anti-Corruption Strategy is pending, see Performance Area 1.

Indicator 12.3. High-level corruption is actively detected and investigated

Assessment of compliance

Benchmark 12.3.1.

Analytical sources of information, at least FIU reports and asset and interest declarations, are routinely used for the detection of high-level corruption

This benchmark requires routine use of various financial and other analytical sources of information for the detection of high-level corruption. To prove compliance, the country has to provide statistics for the previous calendar year on the number of high-level corruption cases detected based on FIU reports, asset and interest declarations and other sources.

The Istanbul Anti-Corruption Action Plan (IAP) 4th round report praised proactive detection of corruption by the NABU as being impressive, especially compared to limited enforcement efforts on high-level corruption cases before the establishment of the NABU and SAPO.

However, the information on detection based on these sources provided by Ukraine for this reporting period is incomplete suggesting that in 2020, the FIU sent 168 reports to the NABU (a decrease from 300 reports in 2018) and only 4 cases were opened as a result. In the same year NABU opened 5 criminal cases on the basis of the NACP's 36 reports following the verification of asset declarations (also a decrease compared to 2018 - 96 reports).

During the on-site visit, the authorities explained that the cooperation between these agencies is active and, in practice, FIU reports and NACP referrals lead to opening cases, but in 2020, all cases initiated on the basis of NACP referrals had to be closed due to the decriminalisation of offences as a result of the CCU decision.[107]

As to other sources of detection, in 2020, 5 cases were detected through media reports, 158 based on individual applications; 44 based on the applications of legal entities and 453 based on other sources, including the information from the State Fiscal Service (SFS), temporary commissions of inquiry, committees of Parliament and the Accounting Chamber.

While the number of detected cases based on FIU reports is low for 2020 evidence gathered by the monitoring team demonstrates active cooperation of the FIU and the NACP with NABU in line with respective MOUs.[108]

[107] Decision of 27 October 2020 No. 13/2020 decriminalised false asset declarations.

[108] During the visit no stakeholders raised concerns over the quality of FIU reports, accordingly the monitoring team does not believe that this factor can explain the low number of criminal cases initiated on the basis of FIU reports.

Benchmark 12.3.2.

All public allegations of high-level corruption were investigated or justified decisions not to open an investigation were made

This benchmark evaluates all past situations when allegations of high-level corruption were made, investigated, and ended with a decision. On-going investigations at the time of the on-site visit are not covered. Justified decisions are those that explain the substance and grounds for a decision. If there is at least one public allegation of high-level corruption not investigated or justified decisions are not made public, the country is non-compliant with the benchmark.

In Ukraine, two main scenarios merit evaluation in connection with this benchmark: first, information was provided about instances where the Prosecutor General refused to open cases against Members of Parliament (MPs) over the objection of the NABU for the stated reason of a lack of sufficient evidence; and second, politically sensitive cases under NABU's investigative jurisdiction were transferred to other investigative bodies without legal grounds and some of them were subsequently closed.

With regard to the MPs, in connection with the amendments to the rules on lifting immunities of MPs, a case against an MP can only be opened by Prosecutor General who also approves all related procedural actions (Art. 482-2, CPC). Refusal to start an investigation cannot be appealed as this decision is not a procedural action and is provided by the Prosecutor General in the form of a letter. Stakeholders, including authorities, referred to various instances of the Prosecutor General refusing to open cases on alleged corruption offences by MPs despite the calls by the NABU to do so. It appears that in some instances, only after the NABU and SAPO publicly reported about impediments in criminal proceedings and following media and civil society pressure, some cases have been opened.[109] No clear rebuttal of this information was provided to the monitoring team.

Regarding cases transferred away from the NABU that were then closed, the monitoring team was advised that these are usually appealed by NABU detectives and there were a few such cases pending appeal during the visit.[110] CSOs responses to the monitoring questionnaire, stated that some cases were transferred to "a controlled law enforcement body", which "conceals" the entire case and sometimes allows the offenders to escape liability citing several such cases ("Tatarov case",[111] "VMB case", "Gladkovsky case" "Rotterdam+ case"). The VMB and Gladkovsky investigations have been completed by the NABU despite undue interference. The Tatarov investigation appears to still be ongoing. The Rotterdam+[112] investigation was again closed on 27 August 2021. The 4th closing of the Rotterdam+ investigation by the SAPO and the reported withholding of the decision from the NABU until the time in which it could appeal the closing had run also raises serious concerns among stakeholders and the monitors which have not been rebutted.

---

[109] NABU (15 September 2020), NABU calls on the Prosecutor General to sign a notice of suspicion of committing a crime by the Member of Parliament; Radio Free Europe (30 September 2020), "Guardian of the Untouchables?" How Venediktov blocked the investigation against another "servant of the people"; Pravda (26 May 2020), SAP prosecutors responded to Venediktov's accusations.

[110] Cases transferred from NABU to other law enforcement bodies are discussed in more detail under benchmark 13.1.3 of PA 13.

[111] TI Ukraine (30 November 2021), Who is "Burying" Tatarov's Case? A timeline.

[112] Kiev Post (10 June 2021), Detectives accuse prosecutors of sabotaging high-profile Rotterdam+ case.

As regards the 370 cases closed by the NABU in 2020, the representatives interviewed during the visit explained the grounds for closing these cases and provided detailed statistics showing that most of the cases were closed due to the absence of elements of crime, decriminalisation of offences involving false asset declarations (this provision was partially restored, see PA 3) and the expiration of the statute of limitations.

Benchmark 12.3.3.

Requests of foreign jurisdictions for information or legal assistance in high-level corruption cases, if received, are executed without delay

Under this benchmark countries are expected to remove unreasonable or unduly restrictive conditions for efficient international cooperation, such as many layers of bureaucracy or other unjustified formalities. If in the reporting period at least one received request was either executed with unreasonable delay or rejected without reasonable grounds, or ignored, the benchmark will not be met.

Ukraine reported that incoming requests for mutual legal assistance (MLA) in high-level corruption cases received by the NABU are generally executed within a one-month period from the date of the receipt of the request by the NABU, as provided by the CPC. Ukraine also acknowledged that in isolated cases where the requests involve complex procedural actions, including the approval by a prosecutor or those that may only be carried out by decision of an investigating judge, the time is extended.

In 2020, the NABU reported receiving 29 requests for international legal assistance in cases of corruption from foreign competent authorities, 24 of which have already been fulfilled. The average time used for execution of these requests was 3 months.

Benchmark 12.3.4.

Requests to foreign jurisdictions for information or legal assistance in high-level corruption cases of transnational nature are made promptly and without delay

Outstanding in Ukraine: Outgoing extradition requests are delayed

This benchmark requires that requests to foreign authorities for information or legal assistance in high-level corruption cases, when needed, are made promptly and without delay. In 2020, the NABU sent 223 MLA requests to foreign jurisdictions, out of which 155 were executed, the rest are pending. However, during the visit, the authorities highlighted a problem that although the Criminal Procedural Code provides that the NABU is mandated to carry out mutual legal assistance during the pre-trial stage of investigations (article 545 CPC, articles 16, 17 Law on NABU), but in practice, the NABU cannot submit all requests independently (this is both about some MLA requests and all extradition requests), and needs PGO approval, in which case requests may be delayed. The NABU can only submit requests based on multilateral, but not bilateral agreements because the PGO is the central authority under bilateral agreements. For extradition to Ukraine, only the PGO can submit requests. The authorities stated that this constitutes an obstacle, and the legal provisions should clearly provide that the NABU, or at least the SAPO, can send such requests. In 2020, the GPO received 13 extradition requests from NABU of which 9 were accepted, accordingly 4 requests concerning 2 individuals were rejected. Consequently, approximately 31% of requests for extradition submitted by the NABU were rejected in 2020. No evidence justifying these decisions on extradition was presented to the monitoring team. Stakeholders also

underlined the importance of full autonomy of requesting and ensuring extradition in the course of the international cooperation in the criminal proceedings under their jurisdiction, considering related practice. In a high profile case the NABU raised a concern over the Prosecutor General's Office blocking a request for the extradition of the beneficial owner of VAB Bank in December 2020.[113]

Ukraine is encouraged to address these limitations for extradition and other legal assistance, by changing relevant regulations and implementing them in practice.

For MLA requests for evidence, there is concern about confidentiality and risk of improper interference with the NABU's work which should be addressed, but monitoring team has no concrete examples of unreasonable delays.

Benchmark 12.3.5.

Asset recovery practitioners are routinely involved in the investigation and prosecution of high-level corruption cases

This benchmark requires that asset recovery practitioners are involved in the investigation and prosecution of high-level corruption cases by conducting financial investigations or other actions aimed at the identification, tracing or return of instrumentalities and proceeds of respective corruption offences. Such practitioners may be involved at different stages of investigation and prosecution of high-level corruption cases and in different legal forms. The country needs to show that such involvement is systematic.

In Ukraine, investigators and prosecutors may request information from the ARMA in order to identify and search for property that may be seized in criminal proceedings (article 170(1) CPC). The ARMA received 47 requests from the NABU in 2020, constituting a significant decline since 2018 when 134 requests were made by the NABU. The monitoring team does not have any data on the regularity of ARMA's involvement in later stages. However, during the visit, the authorities underlined that by law the ARMA cannot be consulted at the pre-trial stage when a decision is made whether to seek a restraint or seizure of an asset but law enforcement cooperates with the ARMA after the property and assets have been seized and there is a court decision to transfer assets. Authorities also noted that the ARMA has developed a draft Order aimed at resolving this issue by allowing the ARMA's involvement in criminal proceedings as specialists when special knowledge and expertise are required in finding, tracing, seizing or managing assets in the case under investigation.[114] The draft Order is still in the process of being approved by the relevant state authorities. .

The monitoring team notes a dip in the number of instances in which the ARMA was consulted but the number of requests is still high. Considering that the NABU conducts its own financial investigations, the mere drop in number of requests in this reporting period is not by itself a cause for concern.

[113] NABU (2 December 2021), Prosecutor General`s Office blocks the prosecution of the persons involved in crime in the National Guard case.
[114] ARMA (2021), Draft Order "On approving the Procedure for involving ARMA's officials as specialists in criminal proceedings".

Indicator 12.4. Liability for high-level corruption offences is effectively, independently and impartially enforced

Assessment of compliance

Benchmark 12.4.1.

There is a wide perception among the main stakeholders that the cases of high-level corruption are investigated, prosecuted and adjudicated independently and impartially without political or other undue interference

In Ukraine, there is a wide perception among the main stakeholders that the investigation, prosecution and adjudication of high-level corruption cases are subject to political and other undue influence which poses increasing threats to effectiveness in combating high-level corruption and on occasion has prevented corruption cases from being addressed. The stakeholders referred to a recent growing trend of what appears to be an aggressive, coordinated and improper political and other undue interference into investigations and prosecutions of high-level corruption cases included at least the following in 2020:

- A case involving alleged active bribery by a senior official of the Presidential Office who was an attorney at a state construction firm when the alleged crime was committed, where there appeared to be a well-coordinated and planned action on the side of the Prosecutor General, Pechersk District Court and other authorities to avoid liability of the person in question. The interference included preventing the signing of notices of suspicion by reassigning the case to another prosecutor in the middle of the night before the HACC's pre-trial hearing. The prosecutor eventually requalified the offences to make it appear that the NABU had no jurisdiction, getting the district court to enter orders preventing the investigation from being handled by NABU and SAPO and retaliating against the NABU and SAPO officials by initiating investigations by the SBI into allegations that the originally assigned prosecutors and NABU investigators tried to illegally prosecute an innocent person. The NABU press release referred to this case as an unprecedented interference in that NABU's investigation. The senior official was eventually presented charges and the case is ongoing. However, the timeline for conducting a pre-trial investigation has expired and it is likely that the case will be closed.
- A case involving alleged embezzlement of stabilisation loan for his bank involving a high-ranking official of the National Bank of Ukraine in which the district court illegally with the violation of jurisdiction and interference in the discretion of prosecutors ordered to close the criminal proceeding. Subsequently, when the case was reopened, and the NABU handed in the notices of suspicions to 10 persons, the court ordered the PGO to change the pre-trial investigation body from the NABU to any other one and the PGO blocked the extradition request for the defendant; The case in now appealed in the HACC.
- A case involving alleged offenses by an alleged organised crime group of judges of District Administrative Court of Kyiv suspected in interfering in the work of judicial bodies, including the High Qualifications Commission of Judges. In this case, the court, in violation of jurisdiction and by unlawful interference in the discretion of prosecutors, ordered the PGO to move the case from the NABU to any other law enforcement agency and the High Council of Justice refused to strip judges of their immunities to permit further action and assessed the investigation by the NABU as pressure on judges.
- A case involving allegations against the participants to an illegal agreement with the Ukrainian government in which the prosecutor closed the criminal proceeding illegally three times but the

Prosecutor General refused to change the prosecutor despite obvious facts of his ineffectiveness and bias in this proceeding.[115]

- A case involving allegations that when it was disclosed that the NABU initiated an investigation based on alleged violations in the procurement of vaccines, it triggered an unprecedented reaction by political leadership and an attempt to dismiss the NABU Director through various bills.[116]
- A case involving allegations that the High Council of Justice has attempted to use disciplinary procedures to intimidate HACC judges.[117]
- Instances of apparent acts of intimidation directed at HACC judges in at least one high-level corruption case involving a former MP which go on unaddressed by attorney licensing officials and investigative authorities with jurisdiction over alleged crimes against HACC judges or obstruction of justice.
- A case involving the largest bribe offered to NABU officials with the intent to influence the NABU to close an investigation involving a former Minister. The District Court of Perchersk illegally ordered the investigation be transferred from the NABU to another investigative agency without investigative authority without apparent objection from the PGO or any explanation of the legal necessity for the transfer.
- The unusual personal involvement of the Prosecutor General in a certain high profile case involving an oligarch and a powerful former bank owner which is suspected of being a way to benefit the suspect.
- After evidence of a potential leak about the impending arrest of a defendant in a high-profile case, the Prosecutor General announced she knew who was involved and why they leaked information but said in effect she would see what the consequences would be, and there has been no further information after several months.

Accordingly, while many investigations and cases involving high-level corruption appear to be handled in accordance with the applicable law, there are several concerning recent examples of aggressive interference and attempts to manipulate the system to accomplish the result of preventing the authorized independent anti-corruption bodies from handling certain politically sensitive matters. Each of these cases have been the subject of public reporting with no or insufficient response from the PGO to justify or explain the circumstances as appropriate under its disclosure rules. The monitoring team finds that the conduct described poses a serious threat to the rule of law.

---

[115] Pravda (5 May 2021), Venediktov replaces prosecutor who closed Rotterdam + three times; NABU (15 September 2020), NABU calls on the Prosecutor General to sign a notice of suspicion of committing a crime by the Member of Parliament.

[116] ANTAC (16 February 2021), The AntAC analyzed the draft law with the help of which activities of the NABU will be blocked and controlled director will be selected; Kiev Post (15 February 2021), Zelensky may be behind Cabinet bill to fire NABU head.

[117] High Anti-Corruption Court (28 January 2021), HACC judges approved a statement guaranteeing the independence of the Supreme Anti-Corruption Court; Dejure Foundation, GRP puts pressure on judges of the High Anti-Corruption Court; TI Ukraine (14 January 2021), The High Council of Justice is Becoming an Obvious Tool in the Hands of Corrupt Officials.

Benchmark 12.4.2.

The progress of investigation and trial in high-level corruption cases, as well as decisions on the conclusion of investigations or not to open an investigation in such cases are routinely communicated to the public

This benchmark requires that the progress of investigations and trials in high-level corruption cases, as well as decisions on the closing of investigations, or opening a case should be routinely communicated to the public. Information and examples were provided as to how specialized agencies (NABU, SAPO, HACC) inform the public about the progress of the investigation and trial of high-level corruption cases through their official websites, participation in various public events: press conferences, discussions, round tables, presentations, TV programmes, radio programmes, publications in other printed and through their social media pages.

Benchmark 12.4.3. – 12.4.5.

BENCHMARK	UKRAINE 2020	
	Total	Per 1 million of population
12.4.3. Track record of convictions for high-level corruption	23*	0.52
12.4.4. Track record of convictions of high-level officials who were in office at the beginning of investigation	2	0.04
BENCHMARK	UKRAINE 2020	
	Total	%
12.4.5. Track record of recovery of corruption proceeds from abroad in cases of high-level corruption	N/A	N/A
* 2 judgements were revoked in connection with the CCU decision decriminalising false declarations that was later partially restored. Source: The population of Ukraine is 44 million according to the information provided by the World Bank: https://www.worldbank.org/en/country/ukraine/overview		

Benchmark 12.4.6.

At least 50% of final sanctions for high-level corruption entail imprisonment without conditional or another type of release

Ukraine does not collect complete data on the type of sanctions in convictions for high-level corruption cases. According to the responses to the questionnaire, data on the final sanctions for high-level corruption

could not be provided due to the mismatch of definitions of the high-level corruption for the purposes of this monitoring and under Ukrainian legislation. A follow-up analysis by the NACP concluded that 82% of sanctions for bribery in the public sector, committed under aggravating circumstances (that includes high-level corruption) have entailed imprisonment without conditional or another type of release, but the information about other corruption offenses is not included in this figure. These are cases handled by bodies other than the HACC and the NABU and SAPO.

At the same time, the HACC's statistics are relevant, since its jurisdiction extends only to high-level corruption cases, even though not all high-level corruption cases, potentially concluded in other courts are captured, but the latter does not seem to be high. In 2020, the HACC rendered 20 sentences against 23 high-ranking officials. Of these, 13 persons (56.5% of the total number of convicts) were sentenced to imprisonment. In general, the low level of convictions in high-level corruption cases in Ukraine during this review period is likely mainly due to the fact that the HACC has only recently begun to function and to work on the backlog of cases filed by the SAPO.

Benchmark 12.4.7.

A prohibition from holding public office is applied to all persons convicted for high-level corruption

To be compliant with this benchmark, there must be statistics that show that a prohibition from holding public office was applied to all persons convicted for high-level corruption in 2020. Prohibition of the right to hold certain positions or engage in certain activities is envisaged as a secondary sanction for almost all corruption offences. However, statistics on application of the mentioned additional sanction show that it was applied only once in a high-level corruption case in 2020, whereas at least 23 people have been convicted as indicated in the benchmark 12.4.6. It is noteworthy that while not a prospective ban, according to the responses to the questionnaire, the law also provides for an immediate and unconditional dismissal from office of a person convicted of an intentional offence, and corruption offences are intentional under the law (relevant legal provisions are disbursed in 30 different laws). Monitoring team was informed that all convicted persons are automatically banned from public office for the period of their criminal record.

13 Specialised Anti-Corruption Investigation and Prosecution Bodies

In Ukraine stand-alone specialised investigative and prosecutorial bodies, the NABU and SAPO, have exclusive jurisdiction for high-level corruption cases.[118] But in other corruption cases investigated, prosecuted and adjudicated under the general system, specialisation is not ensured.

The heads of both the NABU and SAPO were appointed following a transparent and merit-based procedure carried out by selection boards composed of independent experts and international dignitaries. The tenure of both heads is protected by law. But there are numerous attempts to remove the current Director of NABU, including through many draft laws widely seen as attempts to deprive the NABU of its institutional independence.

As the former head of SAPO resigned in 2020, significant powers of the SAPO are now exercised by the current Prosecutor General until the head is appointed. A competitive selection process of the new head is ongoing but delays appear motivated to ensure that the SAPO does not regain its independence under the law. There is a growing negative trend of circumventing of NABU and SAPO jurisdiction without any apparent legal justification.

Indicator 13.1. The anti-corruption specialisation of investigators is ensured

Background

The National Anti-Corruption Bureau of Ukraine (NABU) is an investigative body specialised in high-level corruption cases. The law on NABU defines its mandate and operation. The NABU's investigative jurisdiction is mirrored by the prosecutorial jurisdiction of the Specialised Anti-Corruption Prosecutor's Office (SAPO - discussed in the following sections), and the judicial jurisdiction of the recently established High Anti-Corruption Court (HACC - discussed in PA 5).

[118] Ukraine's anti-corruption institutional infrastructure includes other bodies as well discussed in other chapters of this report, NACP (PAs 1-4), HACC (PA 5); ARMA (PA 11).

Assessment of compliance

Benchmark 13.1.1.

Investigation of corruption offences is assigned in the legislation to a dedicated body, unit or a group of investigators, which specialise in combatting corruption

This benchmark focuses on investigation of all corruption offences and specialisation in high-level corruption cases is addressed under benchmark 13.1.3.

In Ukraine, the law clearly delineates investigative jurisdiction for corruption cases between the NABU, State Bureau of Investigations (SBI)[119] and National Police (Art. 216 CPC).

The NABU's investigative jurisdiction covers high-level corruption offences, in particular those: a) committed by high ranking officials (listed in the Art. 216.5,1 CPC); b) if the object of crime (benefit) or damages exceed certain value (500 times of minimum wage); or c) was committed against a foreign official. The SBI investigates offences committed by the NABU Director, Head of SAPO and its prosecutors, and judges of the High Anti-Corruption Court and the National Police investigates corruption that falls outside the jurisdiction of the NABU and SBI. The Security Service of Ukraine (SSU) has the authority to investigate cases involving counterintelligence activity and combating terrorism but it also has jurisdiction over the abuse of official position offence (Art. 364, CC), if the case is not investigated by NABU.

The law gives precedence to the NABU in case of concurring jurisdiction (for example with SBI. Art. 36.5 CPC). Jurisdictional disputes are settled by the Prosecutor General or deputy Prosecutor General (Art. 216.5, CPC).

The NABU is specialized in combatting high-level corruption but it may investigate other crimes in exceptional circumstances, for example, when a case involves multiple offences, including corruption and it is impossible to separate criminal proceedings.

Specialization in assignment of corruption investigations to certain government bodies is specified in the law, but the NABU is the only body where the cases are investigated by investigators specialized in corruption investigations. According to the information provided, the other investigative bodies who are authorized to conduct corruption investigations, including the SBI, SSU and the National Police do not have specialized units within them to handle sensitive corruption matters and the law does not require them to. Especially in the case of the SBI which has the responsibility under the law for investigating corruption allegations involving the heads of the specialized anti-corruption institutions as well as HACC judges, this is an important issue.

[119] Was established in 2018 to primarily investigate crimes committed by the high-ranking officials, law enforcement officers, specifically those related to torture and ill-treatment, and perpetrators of military offences.

Benchmark 13.1.2.

Corruption cases are not removed or only removed from the specialised anti-corruption body, unit, investigator on legally established grounds, following clear criteria for transferring of such proceedings

This benchmark focuses on preserving the independent investigations of specialized anti-corruption investigators by requiring that the cases are not removed from them or if removed, only based on legally established grounds following clear criteria.

Ukrainian law expressly prohibits violation of the NABU's investigative jurisdiction (Art. 36.5 CPC). However, since its early days, sensitive cases have been removed from NABU in violation of the law, as described in the past OECD/ACN reports.[120]

The evidence gathered by the monitoring team for this review demonstrates that these breaches have been increasing, as the HACC has started to show results in high-level corruption cases.

The Government's responses to the monitoring questionnaire do not dispute and in fact refer to recent examples of transferring cases away from the NABU and (respectively SAPO and HACC) to other investigative bodies in violation of the law. This information was further confirmed during the visit by government and other stakeholders. These cases are extensively highlighted under PA 12, benchmarks 12.3.2 and 12.4.1.

The authorities interviewed during the visit explained that in practice, breaches of exclusive jurisdiction take place through several "schemes". One of the common scenarios involves defence lawyers who appeal to Petchersk District Court requesting to reassign the case on account of alleged violations by the prosecutor in charge of the case. The Court approves the request and instructs the PGO to reassign it.

The NABU detectives usually appeal such decisions to the HACC, but then the appeals chamber is denied access to case file in the Petchersk District Court to create obstacles to hearing the case. In one of such cases, the appeal reached the Supreme Court which stated that the decisions of Petchersk District court cannot be appealed to the HACC. If upheld, this precedent could seriously undermine the NABU's jurisdiction. Another scenario involves a prosecutor launching another investigation on the same facts by re-registering it in the Unified Registry of Pre-trial Investigations, and using the "clone case" to create obstacles in its investigation. Other circumstances are noted in other sections of this report.

These circumstances raise serious concerns about what seems to be blatant violations of the jurisdiction of the NABU (and SAPO and HACC) which pose a serious threat to the rule of law and undermine the fight against corruption in Ukraine. The monitoring team strongly urges that Ukraine act to preserve in law and guarantee in practice the independence and autonomy of the NABU, protect its exclusive jurisdiction, and ensure independent investigation and prosecution of corruption cases.

[120] OECD/ACN (2017), Fourth monitoring round report on Ukraine. OECD/ACN (2020), Anti-corruption Reforms in Eastern Europe and Central Asia, Progress and Challenges, 2016-2019.

Benchmark 13.1.3.

A specialised task force, unit or body to investigate and/or prosecute high-level corruption is established within the criminal justice system and there are no cases of breach of its jurisdiction

As discussed above and in PA 12, the exclusive jurisdiction to investigate and prosecute high-level corruption cases is vested in the NABU and SAPO, respectively, except for allegations involving high-level NABU officials and HACC judges when the SBI has the responsibility. Accordingly for high-level corruption, specialization of investigators is well established in law (though it is not entirely clear if there is a specialized unit within SBI to handle these sensitive allegations). Moreover, in practice numerous breaches of jurisdiction were reported to the monitoring team which were not clarified or rebutted by the Government as demonstrated above (see benchmark PA 12).

The monitoring team also notes concerns by stakeholders of yet unknown risks that may stem from the creation of a new independent law enforcement agency, the Economic Crime Bureau.[121] The investigative jurisdiction of this body does not seem to have been defined in the CPC at the time of the monitoring. After the visit, the monitoring team learned about the draft law passed by the Parliament in the second reading that may possibly limit the NABU's jurisdiction in a few areas. If this is the case, this would be a negative development. The issue will be analysed in-depth in the next year's report.

Indicator 13.2. The anti-corruption specialisation of prosecutors is ensured

Background

The Specialized Anti-Corruption Prosecutor's Office (SAPO) is an independent structural unit of the Prosecutor General's Office (PGO) in charge of prosecuting cases investigated by NABU, and its mandate includes overseeing investigations, providing procedural guidance and ensuring representation in the High Anti-Corruption Court (HACC), including for asset recovery. The SAPO's prosecutorial jurisdiction thus covers only high-level corruption cases investigated by the NABU and excludes those that may be investigated by other law enforcement agencies.

[121] The law was adopted in January 2021.

Assessment of compliance

Benchmark 13.2.1.

Prosecution of corruption offences is assigned in the legislation to a dedicated body, unit or a group of prosecutors, which specialise in combatting corruption

Outstanding in Ukraine: Specialisation of prosecution of corruption cases investigated by bodies other than NABU is not ensured

The law provides that high-level corruption cases investigated by the NABU are prosecuted exclusively by the SAPO. For corruption offences outside the jurisdiction of the NABU and SAPO, specialisation is not ensured by law. This includes allegations of high-level corruption against HACC judges and high-level NABU officials which is to be investigated by the SBI and for lower level corruption investigated by the SBI, National Police or SBU. According to the authorities, such specialisation may be in place informally in the prosecutor's offices with sufficient staff, but not in small districts or units of the Prosecution Service of Ukraine.

Benchmark 13.2.2.

High-level corruption cases are presented in court by the specialised anti-corruption prosecutors

Under the law, the SAPO prosecutors present high-level corruption cases investigated by the NABU in court only. High-level corruption cases investigated by law enforcement other than the NABU (for example the SBI) are not prosecuted by the SAPO. This means that if a case is transferred away from the NABU, it no longer belongs to the prosecutorial jurisdiction of the SAPO. There is abundant evidence of numerous breaches of the exclusive prosecutorial jurisdiction of the SAPO, as illustrated above in benchmark 12.1.2 and benchmark 12.1.3, PA 12.[122] Moreover, allegations involving high-level NABU officials and HACC judges are not apparently assigned in the law to specialise anti-corruption prosecutors.

The evidence obtained leads the monitoring team to conclude that these breaches of jurisdiction are not isolated instances, but involve systemic and deliberate, concerted acts on the part of the PGO, some courts, and MPs to undermine enforcement in cases involving the highest levels of corruption. Along with stakeholders in Ukraine, the monitoring team is highly concerned with this practice, which must be urgently discontinued.

[122] Note: if a case is removed from NABU jurisdiction, it is automatically out of SAPO mandate.

Indicator 13.3. Appointment of heads of the specialised anti-corruption investigative and prosecutorial bodies is transparent and merit-based with their tenure in office protected by law

Background

The appointment of the heads of the specialised anti-corruption investigative and prosecutorial bodies is transparent and merit-based and law protects their tenure. But the law with regard to the NABU Director is subject to change as a result of the Constitutional Court decision declaring the President's role in the appointment and dismissal of Director unconstitutional. In May 2021, the Verkhovna Rada passed a bill in the first reading amending a number of laws, which according to the NABU biannual report, as confirmed by various stakeholders interviewed during the visit, turns the NABU into an executive body with a special status, with the Director to be appointed and dismissed by the Cabinet of Ministers, but the Cabinet will not be able to interfere in its work. The monitoring team did not have an opportunity to review the bill. Considering some 20 bills seeking expansion of the grounds for Director's dismissal registered in the Verkhovna Rada in 2019-2020, the risk of stripping the agency of its functional and institutional independence appears to be high.[123]

As a result of the resignation of the former head of the SAPO, the selection of the new head is on going. The monitoring team notes that the acting head does not have the full powers of the appointed Special Anti-corruption Prosecutor and there appears to be a concerted effort to delay completion of the selection process to prevent the appointment of an independent prosecutor insulated from certain political pressures for as long as possible.

Assessment of compliance

Benchmark 13.3.1.

The current head of the specialised anti-corruption investigative body or unit was selected through a transparent and competitive selection procedure, using clear criteria based on merit

The Law on NABU prescribes criteria and process of the selection of the Director who is appointed for 7 years and may not hold the office for two consecutive terms. The Current Director was selected through an open, competitive selection process using clear criteria, based on merit. The selection process was highly transparent, with all the details related to the competition and its results, including the information about the candidates published. The selection was open to media and broadcasted live.

The monitoring team commends Ukraine for putting in place and applying in practice a process for competitive selection of the NABU Director and underscores the importance of preserving it for the selection of a new director upon the expiration of the statutory term of the office of the current Director.

After the visit, a law was adopted, that according to the stakeholders, provides for a transparent and competitive selection process of the NABU Director. The monitoring team will examine this development

[123] NABU (2021), NABU Report, First half of 2021, p. 45.

in the next reporting period. In the meantime the monitoring team encourages Ukraine to ensure transparent, merit-based and competitive selection of the NABU Director in practice.

The monitoring team commends Ukraine for putting in place and applying in practice a process for competitive selection of the NABU Director and underscores the importance of preserving it for the selection of a new director upon the expiration of the statutory term of the office of the current Director.

Benchmark 13.3.2.

An independent expert selection committee played a key role in the selection of the head of the specialised anti-corruption investigative body or unit

An independent Selection Commission composed of 9 members, appointed by the President, Cabinet of Ministers and Verkhovna Rada (three each) played a key role in the selection of the current NABU Director.

The Selection Commission included international and national experts, professors, and human rights activists with high professional reputation that enjoyed public trust. The Commission made decisions through on open vote (Art. 7.1-3 of the Law on NABU). The sessions of the Commission were open to media, recorded and broadcasted live. As a result of the rigorous selection process that assessed professional qualities and integrity of candidates, two nominees were proposed for the appointment to the President of Ukraine from which one was appointed.

One of the proposed draft laws[124] for the selection of the new head of the NABU contains threats for the neutral composition of the selection board[125] according to the stakeholder's responses to the monitoring questionnaire.

The key role of an independent selection commission of the NABU Director should be preserved. "Independent expert selection committee" means a body specially designated for the selection of the head. The members of the committee should not be subordinated to the agency itself or a political body/person. Committee's members should be experts in the area of criminal justice, anti-corruption or other relevant areas and should not be public officials. It is encouraged that members of the committee are selected through a merit-based transparent procedure. "Transparent procedure" means that the public has the information about applicants and the conclusions of the selection process where made public. Merit-based means that decisions on shortlisting candidates and winning candidates are made because of their merit (experience, skills, integrity) and no other considerations, like political or personal preferences, nepotism, etc.

[124] Verkhovna rada (2021), Draft Law on Amendments to Certain Laws of Ukraine Concerning Bringing the Status of the National Anti-Corruption Bureau of Ukraine into Compliance with the Requirements of the Constitution of Ukraine.
[125] ANTAC (16 February 2021), The AntAC analyzed the draft law with the help of which activities of the NABU will be blocked and controlled director will be selected.

Benchmark 13.3.3.

There is a clear and transparent procedure for dismissal of the head of the specialised anti-corruption investigative body or unit based on grounds that exclude political or other undue interference and there were no cases of dismissals outside of such procedure

Clear and transparent procedure and grounds for dismissal of the NABU Director that exclude political or other undue interference are provided in law (Art. 8.4 of the NABU law). Grounds for dismissal are narrowly defined and based on objective facts and not on political or personal preferences. The first NABU Director is currently in office and his term expires in 2022.

However, according to the Government's responses to the monitoring questionnaire, since the last monitoring round, there have been a number of politically motivated draft laws registered in the Parliament to amend the grounds and procedure for the dismissal of the NABU Director aimed at dismissing the current Director before his term expires. Some of these drafts propose adding that committing an administrative offense related to corruption as one of the additional reasons for the NABU Director's dismissal. These drafts were registered after the court's decision in September 2019 against the current Director on a highly debatable case on a possible violation of rules of accepting gifts. According to court's ruling, vacation expenses of the family of the current Director were paid by his friend who was staying at the same place with him. This allegedly violated the CPL and would constitute an administrative offence; however, the NABU Director claimed that he paid his share in cash. The court of appeal affirmed this decision in December 2019. The NABU director has appealed on this case to the European Court of Human Rights.

The monitoring team notes that there are also several proposed drafts which would require the dismissal of the NABU Director based on the decision of the Constitutional Court of Ukraine that the President of Ukraine does not have powers to appoint the NABU Director. One of the draft laws gives these powers to the Cabinet of Ministers.

Civil society representatives have referred to numerous attempts in the past to dismiss the current NABU Director since 2015, by proposed amendment of the dismissal procedure to introduce dismissal based on a simple parliamentary majority vote (2017); requiring a non-transparent and biased audit of the NABU (2017-2018); and various draft laws (2020) and 2021 that would result in the de-facto dismissal of the NABU Director and legal uncertainty for NABU management, if adopted.

The monitoring team urges Ukraine to preserve the statutory term of the office of the NABU Director. Any new procedure should require clear and transparent procedure based on objective grounds. Such guarantees are indispensable for the independence and autonomy of this body and consequently fight against high-level corruption in Ukraine.

Benchmark 13.3.4.

The current head of the specialised anti-corruption prosecutorial body or unit was selected through the transparent and competitive selection procedure, using clear criteria based on merit

This benchmark looks into the appointment of the current head of the specialised anti-corruption prosecutorial body. Current head means the head who held the post at the time of the responses to the monitoring questionnaire or, if changed, during the visit. The Head of the SAPO left the position in summer

2020 and the new head has not been appointed yet. The monitoring team examines the appointment process of the former head.

While the first head of the SAPO resigned after much controversy concerning his own actions, he was appointed in line with the requirements of the benchmark through a transparent and competitive selection procedure, using clear criteria, based on merit as required by Article 8-1(2) PSL and significant cases were brought to court during his tenure. The selection was organised by an independent Commission that included 4 persons appointed by Council of Prosecutors of Ukraine and 7 by the Verkhovna Rada. Selected members had to have high professional and moral qualities, impeccable reputation and significant anti-corruption experience and had to include international experts. The Commission selected two candidates of which the Prosecutor General appointed one.

As discussed in PA 12, the acting head does not have the powers of the Head of the SAPO. The selection process for the new head started early 2021 using similar criteria for candidates and a similar procedure approved by the Selection Commission, but the selection of the members of the Selection Commission itself raised doubts as to their impartiality and the absence of political influence according to the replies to the monitoring questionnaire and information received during the visit. CSO representatives responding to the questionnaire stated that the selection of the Commission members under the parliamentary quota was not transparent and appeared politically biased. In particular, CSO representatives said that four of the seven members selected by the Parliament "lack integrity and experience in fighting corruption." While less specific in their concerns, the European Union. Delegation in Ukraine and the United States Embassy have made public statements indicating that Ukraine may be jeopardizing future financial support if the process is not transparent and focused on the candidates' integrity.[126]

At the time of the visit, the monitoring team was advised that the selection process seems to be deadlocked where the members appointed from the Council of Prosecutors and those appointed by the Verkhovna Rada could not agree. The authorities acknowledged that the composition of the Commission requires changes. In addition, the monitoring team was provided with anecdotal evidence that many candidates may be contesting the results, which would further delay the appointment of the head.

Meanwhile, the monitoring team observed that the absence of the SAPO head has negatively affected the effectiveness of the SAPO and the enforcement work of the NABU which depends on the SAPO in many aspects of its work. For example, in the absence of the Head of SAPO, the notices of suspicion have to be signed by the Prosecutor General. According to the NABU, in a number of instances the Prosecutor General has created obstacles to effective enforcement as shown above under PA 12.

Timely appointment of the new head of SAPO in line with the transparent and competitive selection procedure is crucial for unimpeded investigations and prosecution of corruption cases. The monitoring team urges the authorities to ensure the transparent and impartial process of selection of candidates for the position of the head of SAPO and to complete this process as efficiently as possible. This may require new legislation to ensure a competitive process that is sufficiently insulated from undue political influence which can impede selection of the most qualified candidate and unnecessarily delay the process for improper purposes. For the new head of SAPO to enjoy public trust the selection process must also be seen as impartial.

---

[126] Concorde Capital (18 September 2020), SAP selection commission nominees draw Western criticism; ANTAC (5 August 2021), Selection of SAPO head stopped as the OP is not satisfied with leader of the competition.

Indicator 13.4. The staff of the specialised anti-corruption investigative body is impartial and autonomous from external and internal pressure

Background

The last round of monitoring praised the NABU's independent and rigorous exercise of mandate but raised concerns about continuous external pressure by the ruling elite undermining the effectiveness of its investigations. As documented by various ACN reports, in the past, the NABU and to some extent SAPO, have been under constant pressure that included attempts to dismiss the NABU Director, criminal investigations against the top management and detectives, alleged manipulations of the selection of external auditors to evaluate the NABU that was accompanied with multiple scandals and criticism from civil society. (See discussion below and in PA 12)

As noted, there is a growing trend of beaches of the NABU and SAPO jurisdiction without any apparent legal justification that are occurring in this interim period. The law provides that the SAPO Head who leads the office has the senior rank of Deputy Prosecutor General and reports only to the Prosecutor General, although there are several aspects of the operation of the office that require the SAPO to comply with operational procedures of the Prosecutor General.

However, the law does not provide that anyone acting in the absence of the permanently appointed Special Anti-corruption Prosecutor has the powers of a Deputy Prosecutor General. Accordingly following the resignation of the head of SAPO in 2020, significant powers of the Head of SAPO are now exercised by the current Prosecutor General until the head of SAPO is appointed. This includes importantly signing of notices of suspicion and more ability to seek court enforcement of that jurisdiction and to prevent reassignment of cases away from the SAPO which the law provides should be handled by the SAPO. A competitive selection process is ongoing but delays appear motivated to ensure that the SAPO does not regain its independence under the law (see indicator 3 above).

As noted above, for the laws provide for other bodies to conduct corruption investigations and prosecutions and little is known about any specialization which appears to be ad hoc at best and the monitoring team has no information to decide on whether they carry out their work impartially and without external and internal pressure.

Assessment of compliance

Benchmark 13.4.1.

The assignment and re-assignment of cases among specialised anti-corruption investigators is based on clear and published rules that are set in the legislation and ensure impartiality and autonomy from external and internal pressure

This benchmark looks into the distribution of cases within the specialised anti-corruption investigators requiring that there are clear and transparent rules for such assignment of cases and supervisors are not allowed to assign or remove cases arbitrarily. The rules have to set an exhaustive list of objective grounds for reassigning a case from one investigator to another, i.e. grounds that are based on objective necessity and not personal preferences or undue considerations. The monitoring team noted above that there is no specialization within the investigative bodies responsible for lower level corruption allegations.

Within the scope of the investigative jurisdiction, heads of the investigative body make a decision on assigning a case to an investigator. The monitoring team was not presented with any rules or criteria on which decisions are based. The head can decide on an investigator, or if necessary, an investigative team and the team lead. The head can also remove the investigator with a justified decision and appoint another investigator if there are grounds for removal, or if pre-trial investigation has been ineffective. (Art. 36(1-2) CPC). Clear grounds for recusal from conducting an investigation are set in the law.

During the visit, the representatives of the NABU stated that its internal documents which allocate functions to different parts of the agency are the basis for the decisions for the allocation of cases. These internal instructions are not public to ensure that the security of the NABU staff is preserved. While the monitoring team understands the reasoning behind maintaining secrecy of certain information, the criteria and grounds need to be in place and transparent to be compliant with the benchmark.

Benchmark 13.4.2.

Specialised anti-corruption investigators routinely use the right to challenge orders from superiors through a judicial or another procedure

To be compliant with this benchmark, the law should provide for the right of an investigator to challenge orders from superiors through a judicial or another procedure and the country should demonstrate that during the past calendar year investigators routinely used it. If there are no cases when investigators challenged the decisions of their superiors, the benchmark will not be considered met.

The Law on NABU provides that NABU employees make decisions independently and they are obliged to refuse to carry out unlawful orders or instruction (Art. 20.1 law on NABU). It is not clear how such orders can be challenged, however. The authorities interviewed during the visit were not aware of such cases in practice.

Benchmark 13.4.3.

There is a wide perception among the main stakeholders that the specialised anti-corruption investigative body or unit operates independently and impartially without political or other undue interference in its work

This benchmark focuses on public confidence in the specialised anti-corruption investigation institution. While others investigate corruption, including certain high-level corruption allegations, the only specialized body is NABU for Ukraine.

The NABU is widely perceived by informed stakeholders and the international community as highly independent and impartial in its operations. Having demonstrated rigor in detecting and pursuing high-level and sensitive corruption cases in the face of constant pressure and attacks, NABU's management and staff has earned an unprecedented level of support of internal stakeholders and the international community who have many times helped shield the agency from those attacks. The NABU has countered these attacks by fierce resistance, transparency, accountability, professionalism and the persistence of its leadership and the team that continues to exercise its mandate independently and impartially. Stakeholders interviewed during the visit were united in their positive regard of the NABU.

At the same time, a regular survey conducted in Ukraine does not reflect the positive assessment of the NABU (and SAPO) activities. Razumkov Center's assessment showed a high level of distrust in these institutions (no trust in prosecutors (68%), SAPO (66%), NABU (65%), NACP (65%)).[127]

When commenting on the results of these surveys during the visit, the authorities questioned the impartiality and methodology, but also highlighted an ever increasing smear campaign in the media against the independent NABU Director which could influence members of those surveyed who are not closely tracking its work. In addition, the lack of public awareness of the activities of the specific anti-corruption law enforcement bodies and the possible difficulty to differentiate specialised agencies from other criminal justice bodies could have contributed to the low trust. The public generally had little trust in the Prosecutor General's Office which until recently had both prosecution and investigation functions for almost all crimes.

Civil society representatives interviewed during the visit added that the low trust could be also attributed to the high public expectations for fight against corruption, whereas achieving convictions had been difficult in the last years, which was the reason for the need for the HACC. The HACC has only recently begun its work to try the cases the NABU and SAPO have brought since 2015. But also CSOs challenged the use of survey results saying they are sometimes absurd as demonstrated by a test question about the efficiency of the HACC when the court was not even set up yet and the respondents said the HACC is ineffective. Civil society also pointed to the fact that mass media in Ukraine is mostly owned by oligarchs with a vested interest in carrying out information campaigns aimed at discrediting the NABU Director because of their own liability.

Since the last round of monitoring, this pressure appears to be growing and is manifested in a concerted action involving parts of the PGO, judiciary, and MPs. According to the NABU report, the pressure reached unprecedented levels in the second half of 2020, which was potentially triggered by HACC decisions enforcing anti-corruption laws in cases before them. In the reporting period, such interference included 1) attempts to strip the NABU of its powers, including by Constitutional Court of Ukraine's decisions removing critical legal tools for the NABU to go after corrupt officials, decriminalising illicit enrichment (fully restored), and later decriminalising false declarations (restored); 2) draft legislation that would subordinate the NABU to the Cabinet of Ministers apparently to make the director subject to more political pressure; 3) draft legislation that would introduce additional grounds for dismissal of the head as described in the preceding section, and 4) the initiation of disciplinary and criminal cases against the staff targeting those involved in particular cases. Even more worrying has been the attempts to intimidate NABU detectives which have taken dangerous forms of targeted physical attacks, such as setting fire to a detective's car and damaging their property. The Police are investigating these attacks. Information was also provided that the number of paid smear campaigns in the media against the NABU has also increased.

The monitoring team was also advised that during the reporting period certain NABU detectives have been groundlessly accused of certain unlawful conduct as a way of harassing and intimidating them by subjecting them to the investigations process. At least one of the detectives involved said he and others understood these investigations are a risk of doing such sensitive investigations, and he, and as far as he knew others, fully complied with the investigators requests.

[127] Survey carried out in July 2020.

According to civil society answers to the questionnaire, the most recent example of the political influence was an unprecedented reaction of political leadership and attempt to dismiss the NABU Director in the absence of legally stipulated grounds in the beginning of 2021, allegedly due to the start of criminal investigation of NABU on alleged violations in course of procurement of vaccines.[128]

Despite the pressure, the NABU continued its fierce fight against high-level corruption and the HACC which is now hearing these cases is generally finding the evidence presented is sufficient to convict the accused. But these concerted actions which threaten the leadership of the NABU are alarming and constitute a serious threat to the rule of law, separation of powers and independence and autonomy of enforcement of corruption cases. Ukrainian officials must take responsibility to end these practices.

Benchmark 13.4.4.

There is a wide perception among the main stakeholders that the specialised anti-corruption prosecutors operate independently and impartially without political or other undue interference in their work

This benchmark focuses on public confidence in anti-corruption prosecution institutions. Whereas a general perception of informed stakeholders seems that many SAPO prosecutors work independently and impartially, as they are backed by HACC, there is a wide perception among the main stakeholders of political and other undue interference in the work of the specialized anti-corruption prosecutors.

Since the resignation of the Head of the SAPO, legally, the acting head of SAPO does not have all powers of the Head. In the absence of the Head of SAPO, Prosecutor General interferes in the work of the SAPO by taking decisions on allocation of cases among SAPO prosecutors and changing group of prosecutors in a specific case investigated by NABU adding to the group several SAPO prosecutors and prosecutors outside the SAPO, which constitutes a de facto change of jurisdiction of NABU and SAPO.

In addition, CSO answers to the monitoring questionnaire refer to the cases “dumped” by SAPO.[129] During the on-site visit, the stakeholders clarified that this is a past practice and for now the biggest problem is the interference by the Prosecutor General in SAPO matters. Many more violations are described under PA 12.

Indicator 13.5. The specialised anti-corruption investigative and prosecutorial bodies have adequate human and financial resources

Background

The IAP 4th round monitoring report on Ukraine concluded that the specialised anti-corruption investigative and prosecutorial bodies have adequate human and financial resources. The situation has not changed

[128] ANTAC (16 February 2021), The AntAC analyzed the draft law with the help of which activities of the NABU will be blocked and controlled director will be selected; Kiev Post (15 February 2021), Zelensky may be behind Cabinet bill to fire NABU head.
[129] ANTAC, Register of Closed Cases.

materially since then although the government and the civil society representatives said the NABU could use more detectives and the SAPO could use more prosecutors.

Assessment of compliance

Benchmark 13.5.1.

Specialised anti-corruption investigative body or unit has the number of staff and resources sufficient to carry out functions within its mandate

The NABU has 223 detectives, with the average workload of 8.8 case for each. In addition, 8 investigators work in the Internal Control Department, responsible for investigation of offences committed by the NABU staff. According to NABU representatives, given the complexity of investigations under its jurisdiction, an increase of the number of detectives is desirable. As regards material resources, NABU has sufficient resources, including equipment, with important contributions from donors, which is only a temporary solution. Monitoring team encourages Ukraine to address the lack of sustainability of sufficient NABU staff and resources as a matter of priority to ensure that the NABU carries out its mandate effectively.

Benchmark 13.5.2.

There is a sufficient number of specialised anti-corruption prosecutors to ensure prosecution of corruption cases

According to the Government, the number of anti-corruption prosecutors is sufficient. In total, the number of prosecutors is 41 with average caseload of 20 cases per prosecutor. 3 positions are vacant. However, civil society representatives remarked that more prosecutors should be added in light of the complexity of the cases. The monitoring team notes that as more cases go to trial than ever before now that the HACC is working, a few more may be needed to handle both trials and new indictments.

Benchmark 13.5.3.

The funding received by the specialised anti-corruption investigative body or unit is sufficient to ensure its autonomy

The NABU is funded by the state budget, and financing its activities from other sources is prohibited other than by international agreements of Ukraine or international technical assistance projects. The NABU budget provides for a fund of operative-investigative actions. In 2020, the NABU used 97% of its funding[130] from the state budget. Budget allocations were reduced by 119.1 million UAH in April and December. The NABU receives assistance from donors, for example, the UK funded a software update of a criminal laboratory of the Information Processing and Analytics and an online training in 2020. According to the Government, the level of funding is minimal, but sufficient. At the same time, civil society representatives told the monitoring team that funding for additional detectives is needed.

[130] More detailed information is given in the infographic of NABU Report, Second half of 2020, pp. 48-49.

Benchmark 13.5.4.

The level of remuneration of the specialised anti-corruption investigators is fixed in the law and is sufficient to ensure their independence and reduce the risk of corruption

Remuneration of the NABU employees is defined by law (Art. 23 of the Law on NABU) and includes salary and additional payments for years of service, degree, rank, and access to state secret. Salary of the detectives is around 43 000 UAH that is 1 250 EUR and senior detectives about 50 000 UAH that is 1400 EUR. The level of remuneration of NABU employees, including detectives, is one of the highest in the public sector of Ukraine. The salary of a SAPO prosecutor is equivalent to the NABU detectives.

Indicator 13.6. The specialised anti-corruption investigative body has necessary powers, investigative tools and expertise

Background

Under the IAP 4th round monitoring report, the powers of the NABU, tools and expertise were assessed as mostly sufficient for the exercise of its mandate, but it lacked the technical capacities for wiretapping having to rely on the SSU for this function. Ukraine also lacked a central registry of bank accounts and customer safes. Some of the same issues are not resolved but the audit prepared by external auditors PECB in 2019 found that the NABU was the best managed anti-bribery system in Europe and in full compliance with relevant ISO standard. [131]

Assessment of compliance

Benchmark 13.6.1.

Specialised anti-corruption investigative body or unit has powers, expert and technical capacity to conduct analytical work, financial investigations and covert operations, including wiretapping

Outstanding in Ukraine: The NABU cannot conduct wiretapping on its own in practice. NABU's access to independent expertise for assessing damages is restricted.

NABU has a wide range of statutory powers to conduct quality analytical work, financial investigations and covert operations (Law on NABU, CPC, Law on Operative and Investigative Activities). The monitoring team noted in particular that over time the NABU has achieved important results in proactive detection of corruption. NABU is staffed with detectives that combine the functions of the intelligence officers (operatives) and investigators and analytical officers (analysts) working within NABU's Department on analytics and information processing. Both detectives and analysts have access to and use in their work government-held registries and databases.

[131] NABU (2021), ISO 37001:2016.

However, the NABU's power to conduct wiretapping still cannot be put in practice due to the lack of technical capacities and a gap in the legal framework. Therefore, the NABU still relies on the SSU for wiretapping. This creates practical problems in its work and can undermine the independence of the NABU and the confidentiality of investigations.

The NABU also lacks access to certain key bank data. It can receive bank information upon written request, including the information about a payee, bank code, bank name etc. but the account number of the payee's bank account is not provided due to conflicting legal provisions (the rules on providing such data adopted by the Board of the National Bank of Ukraine in 2020 are not aligned with the law on banks and banking). According to the authorities, the absence of the recipient's account number complicates the process of tracking funds. The NABU stated that they have requested the National Bank to address this contradiction in laws but without response.

Authorities also brought to the attention of the monitoring team the challenge related to the lack of the mechanism for rapid identification of accounts and bank safes of individuals or legal entities. Central registries or central electronic data retrieval systems would allow timely identification of natural or legal persons holding or controlling payment and bank accounts identified by IBAN. Previous Monitoring reports noted this gap and recommended Ukraine to establish a register of accounts of individuals and legal entities. The lack of the register significantly limits the ability of the NABU, SAPO, and other law enforcement bodies to combat corruption and related offences.

Additionally, for assessing damages the NABU depends on outsourced experts and after recent changes in the PPL, it cannot procure private experts any more, while superiors could often influence public certified experts. In some instances, government experts have also been subject to audacious intimidation efforts including public attacks and allegations designed to trigger criminal investigations into their conduct. The exception to this new rule to allow private experts to be retained has been sought but not achieved so far. This is an important shortcoming to independent and effective investigations.

Indicator 13.7. Work of the specialised anti-corruption prosecutors and anti-corruption investigative body or unit is transparent and audited

Assessment of compliance

Benchmark 13.7.1.

Periodic, at least annual, reports containing detailed statistics related to the work of the specialised anti-corruption investigators and prosecutors, including information on the outcomes of cases are published online

This benchmark is focused on the detailed statistical report to inform the public of the activities of bodies entrusted to carry out sensitive corruption investigations. The NABU has developed a strong communications policy. It provides regular updates on all aspects of its operation on its website, prepares and publishes semi-annual and annual activity reports and it also introduced a registry of corruption cases with detailed information on the NABU's open investigations which is a useful tool for civil society and the public to track progress on cases under investigation.

Biannual joint NABU-SAPO reports are regularly published and include statistics, information about key corruption cases and their outcomes, staffing and budget, procurement and expenditures, and existing challenges, in a user-friendly brochure.[132]

Benchmark 13.7.2.

External performance evaluation of the specialised investigative body or unit by an independent expert committee (formed by professionals, who are selected through a transparent procedure based on merit) is conducted regularly against a defined set of criteria and its results are published

This benchmark focuses on external performance evaluation as one important form of ensuring accountability of those entrusted to conduct sensitive corruption investigations. An independent external performance evaluation of the NABU in line with the benchmark is provided in law, but it has never been carried out in practice. The law requires annual audits by a three member Commission with members appointed by the President, the Verkhovna Rada and the Cabinet of Ministers. According to the authorities and press reports, that at the time the Verkhovna Rada debated the issue, there was a widespread perception that the audit process was being used to effectively undermine and prevent NABU's effectiveness and dismiss the NABU Director. International and other experts recommended that an audit should only be commenced after an established record of the NABU's operation.

After the decision of the Constitutional Court of Ukraine, the President's power to appoint a member of the external audit commission was declared unconstitutional and a new law and regulations are needed.

At the same time, the government reported that a supervisory audit was conducted by a group of international auditors of the PECB Group Inc. in March 2020, initiated by the NABU. The NABU successfully confirmed the compliance of the anti-corruption system with the requirements of the international standard ISO 37001:2016. PECB says these certificates are valid for three years. The government also notes that the NABU provides public annual reports of its activities, participates in annual hearings conducted by the specialized anti-corruption committee of the Verkhovna Rada, and cooperates with a functioning public council (see benchmark 13.8.3).

[132] See NABU (2021), NABU Report, First half of 2021.

Indicator 13.8. Specialised anti-corruption investigators and prosecutors are held accountable

Assessment of compliance

Benchmark 13.8.1.

All public allegations of corruption perpetrated by the specialised anti-corruption investigators have been thoroughly investigated, with justified decisions taken in the end and made public

This benchmark evaluates all past situations when public allegations of corruption by specialised anti-corruption investigators were made, investigated, and ended with a decision during the review period. On-going investigations at the time of the on-site visit are not covered. Justified decisions are those that explain the substance and grounds for a decision.

The authorities or stakeholders did not report any unaddressed corruption allegations of the NABU investigators in this reporting period and the monitoring team is not aware of any such public allegations.

The Internal Control Unit is entrusted with investigation of violations by NABU staff if any and it is considered impartial and efficient. It has the responsibility to investigate non-criminal allegations and is supposed to coordinate with the SBI on investigations of criminal allegations.

Benchmark 13.8.2.

All public allegations of corruption perpetrated by the specialised anti-corruption prosecutors have been thoroughly investigated, with justified decisions taken in the end and made public

This benchmark evaluates all past situations when public allegations of corruption by specialised anti-corruption investigators were made, investigated, and ended with a decision during the reporting period. Because of the focus in this benchmark on how cases re resolved, on-going investigations at the time of the on-site visit are not covered by this benchmark. Justified decisions are those that explain the substance and grounds for a decision.

According to the government responses to the questionnaire, there have been no serious allegations since 2017 when in April 2017 NABU detectives initiated an investigation into allegations involving the head of the SAPO that led to the NABU wiretapping the Head of SAPO. These actions documented activities of the Head of SAPO which may have prevented successful investigation of high-level corruption cases. This alleged wrongdoing included giving instructions to witnesses before official interrogation and sharing information with suspects on cases investigated by the NABU.

Although part of the investigative results were later disclosed to the public and several criminal cases were initiated, the investigation of the Special Anti-corruption Prosecutor was later closed. Based on the PGO disciplinary committee's review of materials the Head of the SAPO was later reprimanded.

There were also instances where the SAPO and certain other prosecutors were accused by the public of being too loyal to a suspect, which resulted in creation by some CSOs of the list of cases "dumped" by the

SAPO.[133] For example, civil society responses to the monitoring questionnaire referred to allegations expressed in regard to a SAPO prosecutor, where no follow up has taken place based on allegedly unjustified decisions to close the investigation of a case involving an agreement with the government over energy prices. In the absence of anyone with the powers of the Special Anti-corruption Prosecutor since the former head's resignation in 2020, the Prosecutor General mentioned only that an "inspection" would be conducted on his actions in the criminal proceeding.[134]

Benchmark 13.8.3.

Specialised anti-corruption investigative body or unit has functioning mechanisms for public oversight, such as public councils, which include key stakeholders selected on clear criteria and through a transparent procedure.

The NABU (a specialised anti-corruption investigative body) has a functioning mechanism of public oversight. A Civil Oversight Council (COC) operates based on NABU Law (Art.31(1,3)). The COC includes 15 members selected through an open process based on clear criteria and through a transparent procedure. The members, elected through an online vote by citizens, include prominent representatives of civil society. The Council monitors activities of the NABU including by reviewing its reports and providing recommendations, attending trials and monitoring high-level cases. Two if its members are also represented in the NABU's Disciplinary Commission. One of the roles of the Council is to increase awareness of the NABU work and thus enhance its accountability to the public.

NABU representatives interviewed during the visit assess the Council's work as effective and cooperation with them as a partnership. During the sixth convocation of the Council in 2020-2021, Council members continued to participate in the NABU's disciplinary and competition commissions for NABU staff, analysed the NABU's biannual reports and prepared conclusions, and submitted information, including about 1) an alleged criminal offence for investigation by the NABU, 2) a request to have the NACP verify declarations of members of political parties and an MP which resulted in opening a criminal case against an MP; 3) concerns about the appointment of the new head of Naftogaz; and 4) possible overestimation of cost of vaccines, and other related information. The Council also published various articles and analysis. Brief information about the results of the work of the COC is included in the NABU biannual reports and on the COC website too.[135] In their responses, civil society groups also reported a positive working relationship with NABU.

[133] See ANTAC, Register of Closed Cases; Ukraine Today (27 February 2021), Fairytales for MPs: What Venediktova lied about in her speech in the Verkhovna Rada.
[134] Ukrinform (29 January 2021), Venediktov has appointed an official investigation into the SAP prosecutor in the Rotterdam + case.
[135] NABU (2021), NABU Report, First half of 2021.

Funded by the
European Union